IN THE

Supreme Court of the United States.

OCTOBER TERM, 1897.

MARCH 1, 1898.

No. 47.

THE STATE OF MISSOURI EX REL. THE LACLEDE GAS LIGHT CO., PLAINTIFF IN ERROR,

vs.

MICHAEL J. MURPHY, STREET COMMISSIONER OF ST. LOUIS, AND THE CITY OF ST. LOUIS.

IN ERROR TO THE SUPREME COURT OF MISSOURI.

ORAL ARGUMENT OF MR. HENRY HITCHCOCK, FOR PLAINTIFF IN ERROR.

May it please the Court:

This was an original proceeding instituted in November, 1894, in the Supreme Court of the State of Missouri, in the name of the State of Missouri, at the relation of the Laclede Gas Light Company, against Michael J. Murphy, street

commissioner of the city of St. Louis. The object of the proceeding was to obtain a writ of peremptory mandamus requiring the respondent Murphy to issue to the relator a permit to make an excavation or excavations on a certain street or streets in the city of St. Louis, in order that the relator might exercise its charter privilege of laying electric light wires in underground pipes or conduits.

An alternative writ was issued in December, 1894, and thereafter such proceedings were had that on July 2, 1895, final judgment was entered denying the peremptory writ prayed for, and on the same day a writ of error from this court to reverse that judgment was sued out by the relator.

PROCEEDINGS IN THE CAUSE.

The proceedings in the courts below are summarized on pages 2 and 3 of my brief for the relator, but I desire to briefly call your Honors' attention to the character of the proceedings themselves.

When this bill was filed an alternative writ was issued, to which the respondent Murphy, then street commissioner of the city of St. Louis, filed a return in January, 1895. On January 24, 1895, the relator filed a special demurrer to certain parts, also a motion to strike out other parts, of the return. The cause was then transferred from the division of the supreme court from which the writ had issued to the court *in banc*, on the ground that it involved a constitutional question; and the demurrer and motion to strike out were fully argued, orally and on brief, before the court *in banc*. Subsequently that demurrer and motion to strike out were overruled and judgment entered denying the writ, upon certain grounds set forth in an opinion which was filed as part of the record in the cause—filed, your Honors will observe, at what was in fact an interlocutory stage of the proceedings.

The relator on June 21, 1895, filed a motion to set aside

that judgment and for leave to plead further, which was granted.

The relator on June 28th filed a reply to the respondent's return, containing averments of new matter and setting out in full a certain city ordinance which was pleaded in part only in the respondent's return. To this reply the respondent on June 29th interposed a general demurrer; also special demurrers, covering all parts of it. Thereafter, by leave of court and consent of parties, the City of St. Louis on July 1st entered its appearance as a party to said cause, intervening therein for its own interest, and, by like consent and leave, adopted as its own the return filed by respondent and respondent's demurrer to the reply filed by relator.

Thereupon, without further argument, the court *in banc* on July 2d made an order sustaining said demurrers for the reasons given in the opinion theretofore rendered in the cause and referred to as part of said judgment. The relator declined to plead further, and thereupon final judgment was entered denying the writ on the same day.

Your Honors will observe from this statement that the only argument had in the court below was upon the original *demurrer of the relator to the return of the respondent*. The opinion which was filed when that demurrer was sustained was afterwards referred to in the final judgment, as part thereof, and as containing the reasons for which *the respondent's demurrer to the relator's reply* was sustained.

I wish also to call the attention of your Honors to the fact that there were certain questions of importance presented by the averments of new matter in the reply, which were not in the cause nor before the court at the time that that opinion was filed, and to which I shall presently direct your Honors' attention more particularly.

Mr. Chief Justice FULLER: I should like to know under what system that street superintendent acted, whether he was in subordination to some board or particular part of the

municipal government of St. Louis or whether he acted independently.

Mr. HITCHCOCK: The relator applied to the street commissioner for a permit to excavate a certain street in order to lay its pipes. The street commissioner, as such, was charged with the supervision of the streets and, as such, was alone authorized by ordinance to issue such permits to persons authorized to make excavations therein. Relator claimed the right, under its special charter, to lay its pipes for the purposes of its business and to make the necessary excavations therefor. The street commissioner refused to issue to relator any permit for such purpose, threatening to arrest any one employed by relator therefor. This proceeding was based upon that refusal; which is justified by the respondent, the street commissioner, and by the City of St. Louis, which afterwards entered its appearance as a party to the suit, on the ground that relator had not complied with the requirements of a certain city ordinance in respect to the laying of underground electric wires. Relator contends that those requirements are in violation of its rights under its charter, and that to enforce said ordinance against it would be to impair the obligation of the contract by the State with relator contained in said charter; and that is the Federal question in this case.

I proceed, if your Honors please, to state, in a brief and summary way, the contents of the pleadings.

AVERMENTS OF PETITION.

The petition avers the corporate character of the relator company and that it was incorporated originally by the Act of March 2, 1857, which was amended by the Act of March 26, 1868. Those Acts are set out in full in the petition. It is not necessary nor is there time to read them in full, but I call the attention of your Honors to the more important provisions of each of them.

Act of March 2, 1857.

The first section of that Act incorporates certain named persons *per verba de presenti* as a body politic and corporate, under the style of "The Laclede Gas Light Company," provides for their perpetual succession, and grants them the usual corporate powers. Under the decision in *St. Jo., &c., vs. Shambaugh*, 106 Mo., 566, the words "are HEREBY CREATED and constituted a body politic," &c., being a present grant of corporate powers, without any condition precedent, the corporation came into being upon the acceptance of the charter by the organization which was effected in 1857, as admitted by the pleadings.

Section 2 provides that the capital stock of the company shall be $50,000, and that the same may be increased to $2,000,000, divided into shares of $100 each.

The fourth section provides that the corporators or a majority may *at any time* open books in the city of St. Louis for subscription to the capital stock, and upon $50,000 being subscribed may organize under the charter.

The fifth section grants to the company within that part of the then corporate limits of St. Louis not embraced within the city limits as established by a former city charter of February 8, 1839, certain *exclusive* rights and privileges. I would state, however, that by the Act of March 3, 1857, the words "sole and exclusive" were struck out of this section of the Act of March 2, 1857, and relator in its petition expressly disclaims any *exclusive* privileges. Thus amended, the fifth section of said act grants to the relator—

"The privilege and right of lighting the same [the city of St. Louis, except as above stated] and of making and vending gas, gaslights, gas fixtures, and of any substance or material that may be now or hereafter used as a substitute therefor, and to that end may establish and lay down in said portion of said corporate limits all pipes, fixtures, or other thing properly required in order to do the same (the

same to be done with as much dispatch and as little inconvenience to the public as possible), and shall also have all other powers necessary to execute and carry out the privileges and powers hereby granted to said company."

The corporate powers and privileges thus granted to relator were afterwards extended by the amending Act of March 26, 1868, over the entire city limits, and to be held and enjoyed by relator *forever*. Those are the powers, thus enlarged both as to duration and territorial extent, upon which we rely.

The sixth section provides that the city of St. Louis and said company may make any contracts they may deem to their mutual advantage in regard to the lighting of any parts of said portion of said corporate limits, or any other thing relating to the business and affairs of said company. It also provides that the city shall have the option, at the expiration of twenty years *from the organization* of the company, to buy the property of the company, but provides, further, that if the city shall not so purchase the property and effects of the company—

"Then this charter shall be *and the same is hereby renewed and extended for the further period of thirty years after the expiration hereof.*"

The seventh section makes it a penal offense, punishable by fine and imprisonment, for any person to interfere with the privileges hereby granted.

The eighth section exempts the Company and this Act from the operation of sections 6, 7, 13, 14, 15, 18, and 20 of article first of the Act entitled "An act concerning corporations," approved November 23, 1855. I shall call the attention of your Honors later on to the effect and importance of these exemptions.

The ninth and last section of said Act of March 2, 1857, is as follows:

"§ 9. This act shall take effect from its passage, and shall continue in force for thirty years."

Act of March 3, 1857.

By section 1 of this act, as already stated, the words "sole and exclusive" were struck out of section 5 of the act of March 2, 1857. By section 2, the sixth section of said act was amended by authorizing the city to purchase the company's property, under the twenty years' option, at its appraised value, without any addition of percentage. These provisions have no bearing on the present controversy.

Act of March 26, 1868.

The petition then sets out in full the amendatory Act of March 26, 1868, which your Honors will find on page 7 of the brief for relator.

I read section 1 in full, as follows:

"SECTION 1. The said Laclede Gas Light Company shall and may within the corporate limits of the city of St. Louis, *as the same are now or may hereafter be established*, exercise, have, hold, and enjoy *forever*, all the rights, privileges, and franchises granted to it by the fifth section of the act to which this act is amendatory, and may at any time lease, sell or dispose of any portion of said rights, privileges and franchises to individuals, associations or corporations intending or desiring to exercise the same within any portion of the limits aforesaid."

Section 2 authorizes said company to increase its capital stock from time to time to such amount as may be necessary to carry on its business.

Section 3 declares that nothing in this Act contained shall be construed as affecting the vested rights of the St. Louis Gas Light Company; which at that time held exclusive rights within those parts of the city embraced within the former city charter of 1839. Section 3 also repeals the sixth section of the Act of March 2, 1857, which, it will be remem-

bered, gave to the city of St. Louis an option to purchase the property and effects of the company at the expiration of twenty years from the date of its organization.

Section 4 repeals the amendatory Act of March 3, 1857. The fifth and last section provides that the Act shall take effect from its passage.

The petition then avers that said Act of March 2, 1857, so amended, constitutes relator's charter, under which it has organized and carried on business and which is in full force; recites the special privileges granted to relator by section 5 of that Act, as amended; avers that in 1873, by the so-called "Tripartite Agreement" between the city of St. Louis, the St. Louis Gas Light Company, and relator, the relator abandoned all claim to any *exclusive* right of lighting said city; states that in pursuance of its said charter relator has for a long time been engaged in the lighting business, both by gas and electricity; that it is lighting a part of the streets and alleys of St. Louis by electricity under a contract with said city having yet several years to run, and is furnishing both gaslight and electric light to many thousand private consumers; that for said business it has erected and maintains extensive and costly plants, both gas and electric; has laid and maintains both gas pipes underground and electric wires overhead without objection by said city, as well to supply private consumers as for fulfilling its said contract with the city for electric light; that for electric lighting it is necessary to transmit through wires electric currents of great power, which if accidentally diverted are dangerous to human life and property; and—

"That in order to avoid the increasing inconvenience and danger to the public necessarily incident to that method of distributing electric currents, and in order to provide more effective and proper service, relator has made arrangements to lay its wires underground along and under the streets of said city, according to approved and practicable plans, and is now ready to do so with as much dispatch and as little inconvenience to the public as possible."

The petition then avers that the respondent, Murphy, is street commissioner of the city of St. Louis, having as such the supervision and control of the streets thereof and the enforcement of city ordinances relating thereto, and that by section 568 of the Revised Ordinance (1887) of St. Louis it is provided that no person shall make or cause to be made any excavation on any public street, highway, &c., without written permission of the street commissioner, excepting certain kinds of public work therein specified.

It is then averred that on October 30, 1894, having given notice thereof to said street commissioner, respondent, relator began the work of excavating at a point on Broadway adjacent to its generating plant for the purpose of laying its wires under ground, which work was proper and necessary therefor, but that respondent stopped said work, causing relator's men to be arrested, and notifying relator that he would not allow them to excavate any street without a permit previously obtained from him; that relator then applied to respondent, as street commissioner, for such a permit, so that it might lay wires under ground for the purposes aforesaid in pursuance of its charter rights and privileges, but respondent arbitrarily and unlawfully refused and still refuses to issue to relator any permit to excavate any part of any street of the city for any purpose; whereby relator was and is by said street commissioner absolutely prevented from exercising one of its vested rights granted by the State of Missouri, to wit, its right to lay down in the streets of St. Louis all pipes, fixtures, or other thing properly required to carry on the corporate business of relator.

It is then averred that it was and is the duty of respondent, as such street commissioner, to issue such permit to relator, so that it may, without interference by the police or other city authorities, exercise its said charter powers; and relator, being without other remedy, prays for a writ of *mandamus* commanding respondent, as such street commissioner, to issue to relator a permit to make an excavation on Broad-

way, from Mound street to Olive street, as near the curb as practicable, in so far as such excavation may be necessary for laying relator's electric wires under ground, the same to be done with as much dispatch and as little inconvenience to the public as possible, and for such other process, orders, and remedies as to the court may seem meet.

Your Honors will perceive from these averments that the relator's petition was framed and this relief sought upon the theory—

That the relator is empowered by its charter to carry on the business of making and vending both gas light and electric light; that said charter also vests in the relator the corporate right and franchise, to that end, to establish and lay down in said city all pipes, fixtures, or other thing properly required in order to carry on said business, provided only that the same be done with as much dispatch and as little inconvenience to the public as possible.

That underground pipes for electric light wires are a thing properly required and necessary for conducting said business with the utmost safety and convenience, and to lay such pipes the streets must be excavated.

That relator, desiring to lay pipes for that purpose, applied for the permit to excavate required by city ordinance to the respondent, as street commissioner, said respondent as such commissioner being alone authorized to grant such permit.

That it was the legal duty of respondent to issue such permit to relator to enable it to exercise its charter right of laying such pipe by making such excavation without molestation by the police or other city officers; that by refusing such permit and threatening and causing the arrest of relator's workmen, thereby preventing relator from exercising its said right, respondent violated as well said vested corporate right of relator as his said legal duty as street commissioner, and that the performance of said legal duty by

respondent as such street commissioner should be compelled by the writ of *mandamus* herein prayed for.

RESPONDENT'S RETURN.

The material averments in the return to the alternative writ filed by respondent are as follows:

It admits the enactment of the several Acts averred in relator's petition, setting forth in substance the provisions of the Act of March 2, 1857, and of the Act of March 3, 1857, and those of the Act of March 26, 1868, in full, as averred by relator.

Your Honors will observe that the return expressly admits that by the Act of March 2, 1857, the corporators therein named were constituted a body corporate, with the powers and privileges therein set forth. No question has been or is made by either of the respondents here as to the validity of any provision of that Act.

I would also remind your Honors that in 1857 the State constitution in force in Missouri was the constitution of 1820; that this was superseded by the new constitution of 1865, which was in force in 1868, and the latter was superseded by the constitution of 1875, which is still in force.

Act of March 26, 1868.

The constitutionality and validity of this Act is assailed in the respondent's return on two grounds. It is averred to be null and void, *first*, as being in conflict with paragraph 2 of section 1 of article VIII of the constitution of Missouri, 1865, which forbids the legislature to pass any law *reviving* or *re-enacting* any prior corporate charter as to which certain specified conditions exist. In connection with this averment, it is alleged that the Laclede Gas Light Company, relator, did not *organize* within one year after the Act of March 2, 1857, took effect, nor did it *commence business* within

one year from the taking effect of that Act, and that therefore the Act of March 26, 1868, which it is averred was an Act *reviving* and *re-enacting* the Act of March 2, 1857, was in conflict with paragraph 2, section 1, article 8, of the Missouri constitution of 1865, and therefore null and void.

Said Act of 1868 is also averred to be null and void as being in conflict with section 4, article XXV, of the Missouri constitution of 1865, which forbids any Act (1) to be *revived* or *re-enacted* by mere reference to its title or (2) to be amended in the particular manner therein specified.

I shall hereafter call your Honors' attention particularly to these constitutional provisions and need not dwell on them at present.

It is further averred that relator's charter, by the terms of section 9 of the Act of March 2, 1857, expired on March 2, 1887.

Also that even conceding all relator's claims as to the Acts of March 2, 1857, and March 26, 1868, relator is not entitled to the relief here sought, because it has never been granted a franchise to make and vend electricity for any purpose, its franchises being confined to making and vending gas, gaslights, gas fixtures, and any substance or material used as a substitute therefor, and that electricity is not a substance or material.

The return states that relator has heretofore laid its pipes and fixtures beneath the surface of Broadway from Mound to Olive street, and elsewhere beneath the surface of streets in St. Louis, to supply gas to consumers in said city; that to convey electricity *it is necessary to carry the same either by means of wires strung on poles above the surface or by means of wires strung in non conductive tubes or conduits beneath the surface of the streets*, and relator has never acquired from the State of Missouri or from the city of St. Louis any right to place such wires above or beneath the streets of said city; that section 2721, article 5, chapter 42, of the Revised Statutes of Missouri, 1889, provides that no company shall

place its wires or fixtures under ground in any city unless it has first obtained the consent of the municipal authorities.

It is further averred that it is provided by article 2, chapter 15, Revised Ordinance of St. Louis, 1887, as amended by ordinance No. 16894, that—

"No wires, tubes or cables conveying electricity for the production of light, heat or power, shall hereafter be placed along or across any of the streets, alleys or public places in the city of St. Louis, by any person, corporation or association not having, previous to the passage of this ordinance, accepted and complied with ordinance No. 12723, now amended, *or shall be duly authorized by the municipal assembly*, and then *only upon condition* that such person, corporation or association, *so authorized by ordinance*, before placing its wires, tubes and cables under ground shall file in the office of the board of public improvements an application therefor, stating in detail the streets, alleys and public places which said wires, tubes and cables are to occupy, and the manner in which said wires, tubes or cables are to be secured or supported and insolated, together with a plat showing the route of such wires, tubes and cables; and that thereupon, if the same is approved, the board of public improvements shall grant a permit therefor, subject to such restrictions, regulations and qualifications as may be prescribed by said board, and all such work shall be done under the supervision of and to the satisfaction of the supervisor of city lighting."

It is then averred—

"That relator has never accepted the provisions of said article and chapter, nor of said ordinance No. 16894, *nor has it ever been authorized by the municipal assembly of St. Louis* to place its wires, tubes, and cables under the streets and alleys of St. Louis."

I would respectfully call the particular attention of your Honors to the averments which I have just read, and also to those which follow them, namely:

"Respondent further shows unto the court that said ordinance provisions are legal and binding and valid provisions

and such as the city of St. Louis had the right to adopt and enact under paragraph 2 of section 26 of article III of the charter of St. Louis, which gives said city the power to regulate the use of all streets, avenues, alleys, and so forth, in said city, and such ordinance provisions are legal enactments, *notwithstanding any rights which relator now has or may heretofore have had by virtue of any Act of the General Assembly of the State of Missouri.*"

It is then averred that relator has never made application to the board of public improvements for a permit to place its wires, &c., under ground, nor has complied in any manner with the ordinance provisions aforesaid, and that respondent has not the power to grant any such permit as asked for by relator in this case.

The only remaining averments in said return are, in substance, that on March 2, 1857, the art of lighting by electricity was wholly unknown, and was also wholly unknown to art on March 26, 1868, and that neither by the Act of March 2, 1857, nor by the Act of March 26, 1868, did the General Assembly of Missouri confer or intend to confer upon relator the right to manufacture and vend electricity for lighting purposes.

I desired to call your Honors' attention to the averments of the return which I read a moment ago, setting up as a defense to this proceeding the city ordinance forbidding electric light wires to be placed under ground unless certain prescribed conditions have been fulfilled, because upon those averments and the issues tendered by them arises the crucial question in this case. As already stated, that return was filed on January 14, 1895, by Murphy, the sole respondent. Relator demurred to it upon grounds which need not be stated now, since that demurrer was overruled, and a reply was afterwards filed by relator. The reasons for which the court below overruled that demurrer are stated in its opinion filed on June 18, 1895—the only opinion rendered by that court, and upon the only

argument heard by it in the cause. The court said that inasmuch as the city of St. Louis was not a party to the cause, they did not deem it necessary to pass on any questions *that did not directly concern the duties of the street commissioner.*

But your Honors will observe that the defense set up by the street commissioner in the averments I read just now was based, not upon any ordinance which directly concerned his duties as such, but upon a general ordinance which prescribed certain conditions to be fulfilled before any person or company should have the right to lay electric wires under any city street. In that ordinance the street commissioner as such is not mentioned nor does it prescribe any duty for him or confer any power upon him. In setting up that ordinance as a defense the street commissioner not only undertook to pass upon the validity of the charter rights claimed by the relator, and in pursuance of which he was informed, as the petition states without contradiction, that a permit to excavate was asked from him, but he asserts, in so many words, that the mandate of the city is of superior force and obligation to that of any grant or contract by the State. The express averment of his return is "that said ordinance provisions are legal and binding and valid provisions and such as the city of St. Louis had the right to adopt and enact, *notwithstanding any rights which relator now has or may heretofore have had by virtue of any Acts of the General Assembly of the State of Missouri.*"

In other words, aside from the objections to the validity of relator's charter, the defense set up in the return was in effect that, no matter what its charter powers or rights might be under the grant from the State, the relator could not exercise those rights *until the Municipal Assembly of St. Louis gave it permission to do so.* Not the Board of Public Improvements. The functions of that body under that ordinance, however important, were secondary and subordinate only. The first and indispensable condition was to obtain

authority from the Municipal Assembly to lay underground wires. It is only "such person, corporation or association *so authorized by the Municipal Assembly*" who may file with the Board of Public Improvements an application for a permit to lay wires under ground. That Board is not authorized to receive, much less to approve, any application offered to them by any person or corporation not *so authorized by the Municipal Assembly*. An application to that Board by any person or corporation not *so authorized* for a permit to lay underground wires would be simply futile. The Board would reply—they would be obliged to reply, if they obeyed the ordinance, from which alone they derived any authority in the premises—that having no authority to approve any application from such person, they had no right to entertain it.

That was the defense set up by the respondent Murphy, as street commissioner, in his return as sole respondent, and that defense, as set forth in that return, was afterwards adopted as its own by the city of St. Louis, when by consent and leave of court it intervened for its own interest, entered its appearance, and became a party to the cause. Meanwhile the relator had filed its reply to the return, and to that the respondent Murphy had interposed his demurrers, general and special, and those demurrers also the city of St. Louis, by consent and leave, adopted as its own. And so the issue of law was joined upon the question—the chief and vital question in this cause—whether the mandate of the city of St. Louis or the grant and contract of the State is of superior force and obligation?

RELATOR'S REPLY.

Passing over the demurrer to that return, which was overruled, I may say that, in the reply to the respondent's return, the relator supplied certain provisions of that ordinance which were not pleaded in the respondent's return. The entire ordinance was set out in full in the reply.

The reply was filed on June 28th. It set out the following additional facts:

That by section 8 of the Act of March 2, 1857, the relator and said Act incorporating it were exempted from the operation of certain sections of the general corporation Act of November 23, 1855, already mentioned, of which sections 6 and 7 are the two important ones.

Section 6 provides that if any corporation hereafter created by the legislature shall not organize and commence business within one year, its corporate powers shall cease.

Section 7 provides that the charter of every corporation hereafter granted by the legislature shall be subject to alteration, suspension, and repeal in the discretion of the legislature.

Special charters containing such exemptions from certain provisions of the general incorporation law of 1855 were frequently granted by the Missouri legislature up to the time when the constitution of 1865 was adopted. The customary phrase employed in such charters was simply that the company named should be "exempt from the operation of sections 6, 7, 13," etc. That was the language of the charters in the cases of The Home of the Friendless *vs.* Rowse, and Washington University *vs.* Rowse, in 7th Wallace, in which those two corporations were held to have perpetual exemption from taxation. The exemption from taxation being expressly declared, the further provision that the corporation should be exempt from the operation of section 7 of the general corporation Act of November 23, 1855, was held by this Court to render it an irrepealable contract by the State.

The reply avers that, being so exempted from the operation of section 6 of that Act, the relator was not required to organize or commence business within one year from the date of incorporation, and, being also exempted from the operation of section 7, relator's charter became and was a contract between the State of Missouri and said corporation,

which contract was not subject to alteration, suspension, or repeal by the legislature of Missouri or by any provision of the constitution of the State subsequently adopted, except with the consent of said corporation. Moreover, it is averred that in virtue of the provisions contained in said charter, especially in sections 1 and 4 of the Act of March 2, 1857, the corporators and stockholders enjoyed the right to organize and to commence business *at any time* after the passage of said Act, without reference to the provisions of section 6 of the Act of November 23, 1855, and without reference to any Act of the General Assembly or of the constitution of the State thereafter enacted or adopted on that subject.

It then states, in substance, that under certain Acts passed in 1837 and 1839, incorporating the St. Louis Gas Light Company, which were in force in 1857 and until 1873, that company had certain exclusive rights and privileges by which relator was precluded from selling gas and gaslight in the city of St. Louis without the consent of that company, which was not obtained until 1873, and therefore relator did not begin to make and sell gas till 1873.

Respondent's allegation that relator did not organize as a corporation within one year from the time when said Act of March 7, 1857, took effect, is denied. On the contrary, relator avers that during the year 1857 all the corporators named in said Act met in St. Louis for the purpose of organizing said company thereunder and did then and there accept said charter and opened books for subscriptions to the stock of said company, said entire capital stock, to wit, $50,000, being then and there subscribed, and at said meeting said subscribers and stockholders organized said company by electing a board of directors and officers thereof, and it is averred that said corporation commenced business long before the year 1873.

The several averments in said return as to the alleged conflict between said Act of 1868 and said constitutional provisions are specifically denied: also the averment that

under section 9 of the Act of 1857 relator's charter expired in 1857; and it is expressly averred that, although relator was duly organized as a corporation during the year 1857, the city of St. Louis did not at the expiration of twenty years from the time of said organization, nor at any time, purchase or offer to purchase the property and effects of said company or any part thereof.

It is further alleged that even if respondent's averment that electricity is not a substance or material were true, which is denied, that averment is irrelevant and constitutes no defense to this proceeding.

It is then averred that the object for which relator was incorporated was to carry on the business of lighting the city of St. Louis, as well the public streets and alleys as the public and private buildings thereof; that by said charter was granted to relator the right and privilege of lighting said city and also of making and vending gas, gaslight, gas fixtures, and any substance and material that might then or at any time thereafter be used as a substitute therefor, and to that end relator was expressly empowered to establish and lay down in any part of the corporate limits of said city as then or thereafter established all pipes, fixtures, or other thing properly required in order to do the same, the same to be done with as much dispatch and with as little inconvenience to the public as possible.

I would respectfully call your Honors' particular attention to the next averments in the reply, which are copied in full on pages 18 to 20 of the brief for relator, but which I can only summarize.

It is averred that in order to light a city, or any street or space or building therein, artificial light must be produced, which is done by bringing to a state of incandescence or white heat any substance or material capable of being so used; and for that purpose relator's charter expressly authorized it to make and vend not only gas, gaslight, and gas fixtures, but any substance or material which might then

or thereafter be used as a substitute therefor, and to that end to lay down and establish at any point in said city all pipes, fixtures, or other thing properly required to do the same.

That illuminating gas is a highly inflammable compound of carbon and hydrogen, chemically combined, which, for the purpose of illumination, must be set on fire, thus decomposing the gas, setting free the carbon in fine particles, which become incandescent, producing what is called gaslight. But light may also be produced from carbon by means of electricity, to wit, by using pure carbon in the form of rods and filaments, which are made incandescent by passing through them what is called electricity, the result being that the carbon thus made incandescent gives out what is called electric light, which is of greater illuminating power than gaslight, and is commonly used as a substitute therefor throughout the United States for the illumination as well of public streets and places as of public and private buildings; and that the rights and privileges granted to relator by its charter include the production of artificial light by making carbon or any other suitable substance incandescent by means of electricity, equally with the right of making carbon, in its compound form of illuminating gas, incandescent by the application of heat; carbon being in either case the substance or material which is made incandescent, thereby producing light, namely, by the application of heat when gas is used, while in the production of electric light pure carbon is used as a substitute for gas and is made incandescent by the application of electricity.

It is admitted that, as averred by respondent, relator has heretofore placed its pipes and fixtures beneath the surface of Broadway and other streets in said city for supplying gas to consumers; also, that in order to produce light by means of electricity it is necessary to use wires for conducting the same, and to support said wires either on poles above the surface, as relator is now doing under its contract with said

city, or in tubes or conduits beneath said surface. And relator's purpose in making the excavation on Broadway, mentioned in its petition, was to construct under ground a conduit for said wires, such conduit and wires being properly required for the production of electric light as a substitute for gaslight; and it is further averred—

"That the conduit and wires intended by relator to be so laid down are of the most approved description, such as are used for like purposes in other cities, said conduits occupying when completed a space not exceeding thirty inches in width under the surface of the street, with provision for access thereto at suitable intervals through manholes properly covered and protected, less than 40 inches in width at the surface of the street, the said conduits and manholes when completed and in use offering no obstruction whatever to the use of the streets for travel and traffic, and the danger to life and property which attends the use of overhead electric wires, such as relator is now using under contract with said city of St. Louis for the purpose of lighting the public streets and alleys therein, being entirely avoided by placing said wires in said conduits."

Respondent's averment that section 2721 of article V, chapter 42, Revised Statutes of 1889, provides that no company shall place its wires and other fixtures under ground in any city unless it shall first obtain consent from said city, through its municipal authorities, is denied, said section 2721 applying exclusively to telephone and telegraph corporations organized under said article V of the general corporation law of Missouri. If said section 2721 purported to apply to relator its provisions would be void as being in conflict with its charter.

It is admitted that the municipal authorities of St. Louis did, by the ordinance mentioned in respondent's return, undertake to prescribe conditions for placing wires, tubes, and cables conveying electricity along, across, or under the streets and alleys of the said city: but that such ordinance is only in part set forth in said return and is set out in full in relator's reply.

Your Honors will observe that in the respondent's return this ordinance is referred to by section numbers of the Revised Ordinance of 1887, while in relator's reply the section numbers given are those of the Revised Ordinance of 1892, in and by which the ordinances mentioned by respondent were re-enacted. It is expressly averred that sections 603 to 614, inclusive, of said Revised Ordinance of 1892, which are set out in full in the reply, were and are since April 17, 1893, *the only existing ordinances of said city prescribing any conditions in respect of such electric wires*, and are the ordinances referred to in said return. This ordinance appears in full on pages 52 to 55 of the printed record in this case, and sections 603 to 606 and 612 to 614, inclusive, which are the only sections pertinent to this controversy, are given in full on pages 21 to 23 of the brief for relator.

It is admitted that relator has never accepted the provisions of said ordinance, and has never been authorized by the Municipal Assembly of St. Louis to place its wires, tubes, and cables under the streets and alleys of St. Louis, it being averred that said ordinances are not valid so far as relator's charter rights are concerned, said city having no power to enforce the same against relator, either under paragraph 2 of section 26, article III, of the city charter, or under any other provision thereof, because relator's charter, by reason of the exemptions in section 8 of the Act of 1857, is a contract by the State of Missouri with relator, not subject to repeal or alteration by said city or any municipality thereof, and the enforcement against relator of said ordinance would impair the obligation of said contract, in contravention of section 10 of article I of the Constitution of the United States, upon which relator relies for the protection of its rights.

Said reply further avers—

"That the only condition annexed by its charter, as amended, to the exercise by relator of its right to establish and lay down in said city all pipes, fixtures, or other thing

properly required in order to carry on relator's said lighting business is that the same shall be done with as much dispatch and as little inconvenience to the public as possible; and avers not only that in making its arrangements and preparations to lay its wires under ground along and under the streets of said city, as in its petition in this behalf alleged, and in applying to respondent, as street commissioner of said city, for a permit to make the necessary excavation therefor, *relator has fulfilled every condition to which it was or is lawfully subject in that behalf*, but also that respondent in refusing to relator such permit *did not allege as a ground for such refusal nor did in fact refuse such permit for the reason* that by laying its wires under ground in the manner by it proposed relator *would cause any inconvenience to the public*, but expressly and unconditionally refused to permit relator to make any excavation in any street of said city."

Finally, it is averred that as against relator said ordinances are not valid, legal, or binding enactments, nor constitute any defense to this proceeding—

Because they are not lawful or reasonable regulations of the use of the streets, but prohibit relator from exercising its charter rights except upon conditions which the city has no lawful right to impose upon relator, including the condition that relator shall be first duly authorized thereto by the Municipal Assembly; thereby impairing the obligation of the contract contained in relator's charter.

Because the enforcement against relator of the conditions prescribed by said ordinance would not be a lawful or reasonable exercise by the city of its charter power to regulate the use of streets, or of its police power, but an attempt by the city under color of said powers to compel relator to enter into the obligations and pay the tax and give the bond required by said ordinance; all of which are a denial of relator's rights and impair the obligations of said contract.

Because the provisions of said ordinance authorizing the Board of Public Improvements to prescribe regulations for the use of the streets, and requiring all persons obtaining a

permit from said Board as a condition thereof to agree to comply with all regulations made by said Board is not warranted by the city charter, which requires that the power to regulate the use of the streets therein granted to the Mayor and the Municipal Assembly shall be exercised by ordinance, and does not authorize the delegation of said power to the Board of Public Improvements.

Also because the several conditions prescribed by said ordinance are not independent of each other, but must each and all be complied with under the penalties in said ordinance provided; so that the relator would be subject to said penalties unless, before placing any of its wires under any street of said city, it shall not only have obtained authority therefor from the Municipal Assembly, but shall also have made application to the Board of Public Improvements for a permit, in the manner prescribed, and shall have obtained a permit from said Board of Public Improvements, with such restrictions and regulations as by it prescribed, and shall also have filed with the city register its bond in $20,000, conditioned as prescribed by said ordinance, and its acceptance and the agreement therein required, including an agreement to file sworn semi-annual statements of its gross receipts, and to pay an annual tax of 5 per cent. thereon; all which requirements are a denial of relator's charter rights and impair the obligation of said contract.

Wherefore relator denies that it was under any legal obligation to apply to the Municipal Assembly of said city for authority, or to the Board of Public Improvements for a permit, to place its wires under ground, and avers that it was the duty of respondent, as street commissioner, to issue to relator a permit for an excavation such as applied for.

Relator also denies that either on March 2, 1857, or on March 26, 1868, lighting by electricity was unknown to art, averring, on the contrary, that long before 1857 electricity was used for illuminating purposes, and apparatus had been publicly exhibited to great numbers of persons by means of

which electric light was produced substantially as hereinbefore set forth.

DEMURRER TO REPLY; FINAL JUDGMENT.

As already stated, the respondent Murphy filed on June 29th a general and special demurrers to relator's reply. On July 1st, by leave of court and consent of parties, the city of St. Louis, intervening for its own interest, entered its appearance in the cause and adopted as its own the return theretofore filed by the respondent Murphy, also adopting as its own the demurrers filed by Murphy to said reply. On July 2d, without further argument, said joint demurrers were taken by the court as submitted, and an order was made sustaining said demurrers for the reasons given in the opinion filed on June 18th, to which opinion reference was made as part of the judgment. On the same day, July 2d, relator declining to plead further, final judgment was rendered denying the writ, upon which, on the same day, July 2d, a writ of error from this Court was allowed, citation served, and on July 6th bond filed and approved.

THE QUESTIONS INVOLVED.

In the opinion of the Supreme Court of Missouri, overruling relator's demurrer and motion to strike out part of respondent's return, it was said that by said demurrer and motion the following issues of law were fairly framed:

"First. Is the Act of March 26, 1868, unconstitutional as being in conflict with section 2, article VIII, of the Constitution of Missouri of 1875?

"Second. Is said Act void as being in conflict with section 25 of article IV of said Constitution?

"Third. Did the charter of relator expire by limitation at the end of thirty years from the date of the Act of March 2, 1857?

"Fourth. Do the powers granted relator include the right

to manufacture, sell, or distribute electricity for lighting purposes?

"Fifth. Has the relator the right, under its charter, to place its wires under ground with the assent of the municipal authorities and *without compliance with the requirements of the valid ordinances of the city?*"

That is the way in which the fifth question is stated. In that opinion the Supreme Court of Missouri assumed, without deciding, the answer to the first four questions. It did not directly pass upon either of these questions, but assumed that the relator was an existing corporation, possessing all the powers, rights, and privileges its charter purports to confer upon it. The Court confined itself to the discussion of the fifth question—whether the relator had under its charter the right to place its wires under ground without the assent of the municipal authorities and without compliance with the requirements of the valid ordinances of the city.

If your Honors please, it was in answer to that question that the following statement was made in the opinion of the court below. It will be found on page 44 of the printed Record, and on page 35 of the relator's brief:

"*As the case is now presented*, we must hold that the city, under its power to regulate the use of streets and under its general police power, has the right to require a compliance with regulations which either *wholly prohibit relator from laying its wires under the streets* or which regulate the manner in which it may be done."

Relator denies the proposition that the city has the right to enforce regulations which, without regard to the provisions of relator's charter, should wholly prohibit it from laying wires under ground.

Obviously, the same power or right which would authorize the city to forbid relator to lay its wires under ground unless first authorized by the Municipal Assembly, would equally authorize the Assembly to arbitrarily withhold that au-

thority or consent. Such a right would be simply a right of absolute prohibition, and the Court below went that full length in the passage I have just read from its opinion.

Your Honors' attention has been called to the fact that this opinion was rendered upon *the relator's demurrer to the return*, and not upon the joint demurrer of the respondents to relator's reply, which was taken as submitted and sustained without argument, and, so far as we know, without any special consideration of the new matter contained in the reply or the specific objections to the ordinance complained of which were set up therein, and which I have just stated to your Honors.

Coming now to the questions presented by this record for the consideration of this Court, we suppose that since the relator claims that the enforcement of the ordinance complained of would be a violation of its charter rights, and would impair the obligation of the contract contained therein, it is incumbent upon the relator, first of all, to meet the respondents' challenge as to the validity of its charter and the nature of its rights. Unless the relator has a valid charter, and the right under it to lay electric wires, there is no contract the obligation of which can be impaired by the denial of that right.

Validity of Relator's Charter.

I shall therefore first consider the question of the validity of the relator's charter and its right to the privileges claimed by it thereunder.

Your Honors will observe that these respondents do not dispute the validity of the original Act of March 2, 1857, or any provision thereof. They deny the validity only of the amendatory Act of March 26, 1868. They also claim, however, that the Act of March 2, 1857, expired in March, 1887, in virtue of section 9, which provided that said Act should remain in force for thirty years, and that therefore the relator has no rights nor any standing in court, because, it is

said, since March, 1887, it has ceased to be a body politic, and, if it can be said to survive at all, can be nothing more than the attenuated ghost of a defunct corporation.

Assuming, nevertheless, that this spook of a corporation still has vitality sufficient for its immediate needs, I proceed to consider in its behalf the objections of my learned friend to the Act of March 26, 1868.

The first objection is based upon the provisions of article VIII, section 2, of the Missouri constitution of 1865, which is in these words:

"No law shall be passed *reviving* or *re-enacting* any Act heretofore passed creating any private corporation, where such corporation shall not have been organized and commenced the transaction of its business, within one year from the time such Act took effect, or within such other time as may have been prescribed in such Act for such organization and commencement of business."

To this we answer, *first*, that the Act of March 26, 1868, does not, nor does it purport to, *revive* or *re-enact* any Act whatever; and if that be true, it is not within the purview of the constitutional provision that "no Act shall be passed *reviving* or *re-enacting* any Act heretofore passed," &c. It does not purport to revive or re-enact; it purports to *amend*, and it does amend, by greatly enlarging and extending certain privileges already granted by the Act so amended.

In the case of *St. Jo, etc., R. R. vs. Shambaugh*, 106 Missouri, 567, the Supreme Court of Missouri expressly construed that clause of the Constitution in an opinion directly in point here.

Our contention is that no subsequent Act can be held unconstitutional and void on the ground that its enactment was in conflict with that clause of the constitution of 1865, unless (1) it is a law *reviving* an Act passed before July 4, 1865, or is a law *re-enacting* an Act passed before July 4, 1865; nor (2) unless the Act so *revived* or *re-enacted* was an Act creating a private corporation; nor unless (3) the corpo-

ration created by such original Act failed to organize and commence the transaction of its business either within one year from the time such Act creating it took effect *or within such other time as said Act itself prescribed.* All these conditions must be fulfilled or else the constitutional provision in question does not apply.

In the case of *The St. Jo R. R. vs. Shambaugh* the Supreme Court, construing that clause of the constitution, said:

"The above constitutional provision is not absolute, that is to say, it does not prohibit the legislature from enacting laws reviving prior Acts creating private corporations *in all cases.* The power to enact such laws remains in the legislature, except in the specified cases. Now, the Act in question does not on its face show that it comes within the prohibited cases. On its face it is a valid law. The principle of law is too well settled to call forth citation of authorities that an Act of the legislature will be presumed to be constitutional until its unconstitutionality is made to appear. There is nothing in this record to show that this Act falls within the prohibited cases. In the first place, the prohibition against reviving charters *implies that the charter to be revived is lifeless.* On this record the company was an existing one with perpetual succession *at the date of the alleged reviving Act.*"

That Court thus held that, even though in all other respects a given Act fulfilled the conditions I have just stated, yet if the Act to be revived *is not lifeless*, then it does not come within the prohibited cases. The Act of March 2, 1857, was not lifeless in 1868. My learned friend concedes that it was in full force until March 2, 1887. Therefore, under the decision in the *Shambaugh* case, it is excluded on that ground alone from the category of Acts which are within this constitutional prohibition.

Moreover, the Act of March 2, 1857, does not come within the description of an Act creating a private corporation which did not organize and commence business within one

year from the date of its incorporation, or such other time as the Act prescribed. Your Honors will remember that by section 8 of the Act of March 2, 1857, this relator was expressly exempted from section 6 of the general corporation law, which required all private corporations to organize and commence business within one year; also that relator was, by section 4 of that Act, authorized to organize *at any time;* and from the averment in the reply, not denied, but admitted by the demurrer, the fact appears that it did organize within one year, had its capital subscribed, and had its directors and officers appointed.

Thus from every point of view this Act is entirely without the purview of the clause of the constitution upon which this first objection is based.

My friend asks me whether we contend that we commenced business within one year. I reply that it is immaterial whether we did or not, because of the exemption from section 6 of the general corporation law I have just spoken of. We were not bound by that law at all, and that exemption applied equally to the general corporation Act of November 23, 1855, and to any subsequent Act or constitutional provision of like import, because the further exemption from section 7 of the general corporation law made our charter irrepealable.

I desire to call the attention of the Court to a point stated on page 61 of my brief more fully than I have time to state it now, as to the actual scope and intent of that constitutional provision. That provision was adopted in 1865, as section 2 of an entirely new article (VIII) concerning Banks and Corporations, then for the first time placed in the constitution of Missouri. Section 4 of that article provided that corporations might be formed under general laws, but should not be created by special acts, except for municipal purposes. Before 1865, as the voluminous statute books previous to that date show, hundreds of private corporations had been created by special acts, many of which had expired

by *non-user*. Men went to the legislature and procured all sorts of special charters which they thought might be handy things to have in the house, but which were never used. Many of these charters expired by *non-user*, under that section 6 of the general corporation law which I just now read, and from the operation of which relator's charter was exempted.

Now, the real and manifest purpose of section 2 of article VIII was to prevent these dead corporations from being resurrected by the passage of laws purporting to *revive* or *re-enact* those "lifeless charters." That is what the Supreme Court refers to in the *Shambaugh* case, when it says that the words "*revive*" and "*re-enact*" evidently contemplate that the charter to be *revived* is *lifeless*. It was the resurrection of that class of charters that this clause was intended to prevent.

But where no time was prescribed by the Act within which a corporation was to organize, *a fortiori* where the company was permitted to organize *at any time*, and in fact did organize within one year and was thereafter constantly in actual operation and in existence as a living corporation—where all these things concurred, I submit that I need give no further reason why that constitutional provision has no application whatever.

In other words, I thus summarize our answer to that objection, which your Honors will find more fully stated on pages 59 to 64 of my brief.

The Act of March 26, 1868, does not purport to *revive* or to *re-enact* the Act of March 2, 1857, but purports to be, and plainly is, an Act to *amend* that Act; something essentially different, and which was expressly held to be within the power of the legislature in *State ex rel. vs. Railroad*, 48 Missouri, 468, cited and affirmed in the *Shambaugh* case.

The Act of March 2, 1857, was not *lifeless* when the Act of March 26, 1868, was passed, but was in full force, and

therefore, according to the *Shambaugh* case, did not come within that provision of the constitution.

But my learned friend contends in his brief that the Act of March 26, 1868, did *re-enact* the act of March 2, 1857, because it confirmed and extended the provisions of the Act of 1857. He defines the word "*re-enact*" as meaning to enact over again—to enact the same thing over again. I accept that definition,—not only because it is correct but because it is fatal to his argument. The amendatory Act of 1868, so far from *enacting over again* the Act of March 2, 1877, made important changes in it, repealing some provisions absolutely and greatly enlarging others. It is simply an abuse of language to say that to so *amend* an Act is to *re-enact* it. To enact something entirely different is clearly *not* to "enact the same thing over again."

The next objection to the constitutionality of the Act of March 26, 1868, is found in section 25, article IV, of the constitution of 1865, which is as follows:

"No act shall be *revived* or *re-enacted* by mere reference to the title thereof, nor shall any act be *amended by providing that* designated words thereof shall be struck out, or that designated words shall be struck out and others inserted in lieu thereof; but in every *such* case the act revived or re-enacted, or the act or part of act amended, shall be set forth and published at length as if it were an original act or provision."

There are two distinct provisions in that section. The first is that no Act shall be *revived* or *re-enacted* by mere reference to the title. No objection on that ground can apply to the Act of March 26, 1868, for the obvious reason that it does not purport to either *re-enact* or *revive*, or in any way whatever to affect, any Act "*by mere reference to the title.*" It is, and purports to be, "An Act to *amend* an Act to incorporate the Laclede Gas Light Company, approved March 2, 1857," and it does *amend* that Act, not by mere

reference to its title, nor by any reference thereto, but by specific and detailed provisions.

Secondly, that section 25 provides that no Act shall be amended by the legislature *in the particular method or form* of enactment specified in that section. As to this prohibition, I submit, if your Honors please, that no amending Act can be held void as contravening it, unless such amending Act is *in the form* which this clause specifically describes and prohibits. Unless such Act amends a prior Act "*by providing that* designated words thereof shall be struck out, or *by providing that* designated words shall be struck out and others inserted in lieu thereof," it is not within this provision, and is not void for that reason; and the further provision that "in every *such* case the Act revived or re-enacted or the Act or part of Act amended shall be set forth and published at length, as if it were an original Act or provision," confirms our view by excluding every other form of amendment.

The argument made against the validity of the Act of 1868 under this head in the printed brief for respondents is, that in section 1 it refers to all the rights, privileges, and franchises granted to the company by the fifth section of the Act of March 2, 1857, which language, it is said, is unintelligible without reference to section 5 of the Act of 1857, and reads into the Act of 1868 the provisions of the Act of 1857, and that therefore it *in effect* does that which the constitutional provision in question forbids.

But I submit that our contention is conclusively supported both by reason and by the authorities.

The familiar rule or criterion for determining the proper construction of a new and remedial statute is that we should consider the old law, the evil, and the remedy. Now, we have only to look into any volume of the Session Acts of Missouri before 1865 to find abundant illustration of the evil intended to be remedied by this constitutional provision. I have given illustrations and instances of it on pages

67 and 68 of my brief. Before the constitution of 1865 a very cursory examination discloses that prior Acts were amended in at least six different methods or forms of enactment:

(1.) By adding entirely new sections.

(2.) By expressly repealing a section or sections, designated by numbers, and enacting different provisions on the same subject.

(3.) By enacting that a designated section or sections "be *so amended that*,"—after which the intended amendment is set out in full, sometimes differing entirely, and sometimes differing only in certain words, from the Act amended.

(4.) By enacting that an existing Act or a designated section or sections thereof "shall be, and is hereby, amended *so as to read*,"—and then the intended amendment is set forth, sometimes differing entirely, and sometimes only as to certain words, from the Act amended.

(5.) By expressly repealing a designated section or sections and enacting complete new sections, differing from those repealed only in omitting certain words or omitting certain words and inserting others.

(6.) Without adopting either of these five methods, by simply enacting that *designated words in the act amended shall be struck out* and other designated words inserted in lieu thereof. For example, the Act of November 23, 1863 (Acts 1863–'4, p. 112), amending the Act to provide for the State University (R. S. 1855, pp. 1494, 1499), which is in full as follows:

"SECTION 1. That the third section of the second article of the Act to which this is amendatory shall be so amended that the word *eighteen* be stricken out and *twenty-two* be inserted in its stead.

"This Act to take effect and be in force from and after its passage."

That is the whole Act. That precisely answers the description given in the constitutional provision we are considering, for it undertakes to amend an Act simply *by providing that* designated words shall be struck out and others substituted. That is the precise evil that it was intended to remedy. No other of the six methods I have indicated answers that description, and that meets it precisely.

But that is not true of the Act of March 26, 1868. That purports to be an amending Act, to amend the Act of March 2, 1857. But it provides, not that any designated words shall be struck out, but that the company incorporated by the former Act shall have and enjoy forever all and singular the privileges granted by the Act to which this is amendatory throughout all parts of the city of St. Louis as now or hereafter constituted. It adds new and substantive provisions to those of the former Act, by an enactment complete in itself, and which, under the decision of this court in *Humphrey vs. Pegues*, 16 Wallace, 247, at once, in legal effect, became a part of the Act so amended.

Without giving in detail the reasons set forth in my printed brief under this head, and which seem to me conclusively to support this view, I call your Honors' attention to a number of cases in which the Supreme Court of Missouri has settled beyond any question the proper construction of that constitutional provision.

In the case of *Mayor of Boonville vs. Trigg*, 46 Missouri, 288, which is the earliest and a leading case on that subject, the only question was whether the Act of March 23, 1868, amending in part section 1 of the Act of February 8, 1839, incorporating the city of Boonville, was invalid, as not complying with this same section 25 of article IV of the Constitution of 1865. I read from page 70 of my brief the first section of the Act of 1839, the original charter of Boonville, which was the Act amended, omitting only certain parts of the mere description of boundaries, as follows:

"SECTION 1. All that district of country within the following limits, to wit: Beginning at the mouth of the branch below and east of Boonville * * * (description of boundaries) * * * thence north to the beginning, shall be and is hereby erected into a city by the name of the city of Boonville; and the inhabitants thereof shall be and are hereby constituted a body politic and corporate by the name, etc., * * * (corporate powers set forth) * * * may have a common seal and make and alter the same at pleasure."

The remaining sections of the Act, neither of which was amended by the subsequent Act, provide in detail for the city government, etc.

The amending Act of March 23, 1868, reads as follows:

"SECTION 1. That *so much of section one* of an Act entitled 'An Act to incorporate the city of Boonville,' approved February 8, 1839, *as relates to the bounds and limits* of the city of Boonville, *be amended so as to read as follows:* 'All that district of country within the following limits, to wit: Beginning at the southeast corner of,' etc. (description of new boundaries), 'thence east, following said township line to the place of beginning.'"

That is the whole of section 1 of the amending Act, and is the only portion of said amending Act which purports to amend the Boonville charter. There is only one other section in the amending Act, and that relates exclusively to a special election, at which the amendment in the preceding section is required to be submitted to the people of Boonville for acceptance or rejection.

It was contended with great earnestness in that case that this amending Act was void, as coming clearly within the prohibition of section 25 of article IV of the constitution of 1865; and upon precisely similar grounds to those now urged here. It was urged that the amending Act did, *in effect*, if not literally, strike out certain words from the Boonville charter and substitute other words therefor; that the

amending Act was not complete in itself and was not even intelligible unless it was read into the Act amended; and I must say that there was some force in that contention. No such criticism applies to the Act of 1868, amending the Laclede charter, which is a perfectly complete enactment in itself; and the reference made to the 5th section of the Act amended for the particulars of the franchises mentioned is a familiar and perfectly proper method of compendious description.

The court below, in the case of *Boonville vs. Trigg*, held that the amending Act was within the constitutional prohibition, and was therefore void. But the Supreme Court of Missouri held the contrary. I have time to read only a sentence or two of the reasons given for their decision, which your Honors will find quoted more at length in my brief, on pages 72 and 73. After stating the evils in the way of obscure and doubtful legislation, which this constitutional provision was designed to prevent, and referring to and distinguishing certain provisions in the constitutions of Louisiana and Indiana which were relied on by the defendants, the Court said:

"The constitution in these States expressly declares that where a section is amended it shall be re-enacted and published at full length. But our constitution only requires the Act or part of Act amended to be set forth and published. That was done in this case. *There was no striking out or inserting words in lieu thereof, but there was an amendment of part of the Act, and the amendment was set forth and published entire. The constitution was strictly complied with.*"

That is the test they give. That is exactly what was done in the Act of March 26, 1868, amending the Laclede charter.

In several subsequent and very important cases your Honors will find that the doctrine of *Boonville vs. Trigg* was referred to and affirmed. There are a number of cases in later volumes of the Missouri reports, cases of greater importance than that in regard to the amendment of the

Boonville charter, in which the same objection was made, the same ruling had, and the doctrine of that case affirmed. Those cases are cited in my brief, on pages 74 to 79.

In *State vs. Chambers*, 70 Missouri Reports, 625, decided in 1879, the Court held that section 3 of the Act there in question furnishes an illustration of what was intended to be forbidden by section 34 of Article IV of the constitution of 1875, which took the place in that instrument of section 25, Article IV, of the constitution of 1865, being identical therewith, except that the latter clause added the words "together with the act or section amended," making it that much stronger. But even that provision was held to have exactly the same meaning. What was intended to be forbidden is pointed out by the Court in these words:

"If said section had only contained the words 'section 3 of said chapter 186 is hereby amended by striking out the words *assault, battery, affray, or other breach of the peace,*' in the third and fourth lines of said section, and inserting in lieu thereof the words '*a misdemeanor*,' the amendment *would have been in clear violation* of said constitutional provision."

That describes exactly what would have been a violation and is exactly the case I have put. But that is what our Act of 1868 does not do.

Three or four other cases, very important in themselves, also cited in my brief, follow the same ruling:

Morrison vs. St. Louis, I. M. & S. Ry Co., 96 Missouri, 602.

State vs. Miller, 100 Missouri, 439, where an Act was called in question relating to public schools in cities having over 300,000 inhabitants.

State vs. Bennett, 102 Missouri, 356, involving the constitutionality of the Act establishing the St. Louis Board of Police Commissioners. In that case there was a series of amendatory Acts, every one of which would have been in conflict with the construction placed upon the constitution by my

learned friend; but as to all of them the Supreme Court maintained the construction adopted in the Boonville case.

I will cite only one other case on this point, a case to which I have already referred, *St. Jo R. R. Co. vs. Shambaugh*. I cited it before for another purpose; but, if your Honors will take the trouble to examine the amendatory Act, which in that case was attacked entirely on different grounds—apparently because it seemed hopeless to renew the attack on the grounds we are now considering—you will find that it exactly corresponds with our amending Act of March 26, 1868; that is to say, so far as the question we have been considering was concerned, the Supreme Court of Missouri, in the *Shambaugh* case, assumed the validity of an amending Act in that form.

I desire also to mention, as I have more fully in my brief, that in the case of *State vs. Draper*, 47 Missouri, 29, affirmed in *State vs. Miller*, 100 Missouri, 446, as also in the case of *State vs. Heidorn*, 74 Missouri, 412, the Supreme Court of Missouri expressly held that, under the constitution of 1865, as under the constitution of 1875, it was competent for the legislature to repeal an Act by implication. The bearing of that will be observed later on in connection with another point in the argument. There can be no doubt as to the settled doctrine of the Supreme Court of Missouri on that question.

I also ask your Honors' attention to another case, which to my surprise I find cited in my learned friend's brief as an authority on his side of this question. It is the case of *The People vs. Mahaney*, 13 Michigan, 496, where Judge Cooley states with striking clearness and force the grounds upon which our contention here ought to be, as it was in that case, held valid. In that case the Court construed a constitutional provision intended to remedy similar evils with those contemplated by the provision we have been considering, but expressed in terms far broader than the latter—so broad as to include every case of an amended Act, in

whatever form amended. It is cited at some length on pages 79 and 80 of my brief, to which I beg leave to refer your Honors. Time permits me now to call attention only to the closing sentence of the quotation, which, however, sums up the argument in these words:

"But an Act complete in itself is not within the mischief designed to be remedied by this provision, and cannot be held to be prohibited by it without violating its plain intent."

[At this point the Court adjourned for the day.]

MARCH 2, 1898.

Mr. HITCHCOCK continued:

If your Honors please, a further proposition maintained by the respondent is that the charter of the relator expired in March, 1887. Our contention is, on the contrary, that by the amending Act of March 26, 1868, the duration of the charter of the relator was extended without limit. We contend that the legislature meant exactly what it said when in the first section of that Act it provided that the Laclede Gas Light Company should have and enjoy *forever* all the rights, privileges, and franchises granted to it by the fifth section of the Act of March 2, 1857. In the case of Humphrey *vs.* Pegues, 16 Wallace, 247, your Honors held that the legal effect of an Act amending a corporate charter is precisely the same as if the provision in the amending Act had been in the original Act.

The original grant in this Act of March 2, 1857, in section 9, limited the continuance of that Act to 30 years. I understand from the brief of my friend on the other side that his contention that this charter expired in March, 1887, is based on the proposition that whether the Act of 1868 was valid or was not valid, the duration of the Laclede Gas Light Company's existence terminated in March, 1887, in virtue of section 9 of that original Act. We think the an-

swer to that is very simple, and I shall merely state it without discussing it at length.

In the first place, it ignores the meaning of the word "forever." We must suppose that the legislature, when it passed the Act of March 2, 1868, meant what it said. "Forever" does not mean a period of nineteen years or any other limited period. In the brief of my friend, on this very question, it is conceded to mean unlimited duration.

But it is said that whatever might be the effect of the word "forever," considered by itself, we must take the whole Act together, and that section 9 limits the existence of the company to thirty years. Our answer to that is that section 9 was repealed by necessary implication. I have cited in my brief the cases of *State vs. Draper* and *State vs. Miller*, both expressly holding that the constitution of 1865—

"Has not said that when an Act is passed inconsistent with a preceding one, so that both cannot stand, the latter one shall be void and the earlier one shall prevail, but has left the law as it always has been, viz., that when two statutes are inconsistent and repugnant, the last one enacted shall be considered in force."

Our contention is plain that section one of the Act of March 26, 1868, which provides that this corporation should enjoy its privileges *forever*, is necessarily repugnant to and inconsistent with, and therefore repeals by necessary implication, section nine of the Act of 1857, providing that the charter of the company should cease at the end of thirty years.

There is another defect in the contention on the other side; it entirely ignores the provision of section 6 of the original Act, which was that the city of St. Louis should have the option at the expiration of twenty years from the organization of the Laclede Gas Light Company—not from the time when it should commence to transact business, but twenty years from *the date of its organization*—to buy the

property and effects of the company, and that if the city should fail to so purchase the property and effects of the company at that time, "then this charter shall be, and the same is *hereby, renewed and extended* for the further period of thirty years after the expiration thereof." In other words, it was a present grant of thirty years of additional corporate life, subject to be defeated by the contingency of the purchase, at a given time and in a given manner, by the city of St. Louis, of the property of the corporation. Now, it is not claimed that any such purchase was ever made or ever offered to be made. On the contrary, it is averred and admitted that no such purchase was ever made or ever offered to be made. The city's option therefore lapsed, and so far as the Act of March 2, 1857, alone was concerned, the provision for the thirty years' extension took effect. In other words, if the Act of 1868 either was void or had never been passed, the operation of section 6 of the original charter would *ipso facto* continue this charter to 1917. Of course, I am not contending that this is the correct view. I am simply pointing out an obvious and fatal inconsistency in the argument of my learned friend.

He has insisted at great length in his printed brief—and I assume that he will insist in his argument—that the amending Act of March 26, 1868, was in conflict with two express provisions of the Missouri constitution of 1865, and therefore was and is utterly void. In contemplation of law, as he contends, no such Act ever existed. Very well. If that be so, then section 6 of the Act of March 2, 1857, never was repealed; and if that be so, then, since the city of St. Louis failed to exercise its right or option under that section to purchase the company's plant at the time limited by that section, it follows that under the further express provisions of that section the company's charter was "thereby renewed and extended" for thirty years longer—that is, until March, 1917; but if that be so, then that charter did not expire in

March, 1887, and, so far from the company's being for ten years past the mere gibbering ghost of a corporation, it is the argument of my learned friend which has melted into thin air.

But, I repeat it, our contention is, not that this charter was extended by that section 6 to 1917, but that in virtue of the express grant in section 1 of the Act of March 26, 1868, the corporate life of this company is to endure *for ever*. We contend, for the reasons already stated, that the Act of 1868 was not void but valid in each provision and in every respect. The objections to its validity, based on the two constitutional provisions I have discussed, it seems to me have been shown to be wholly without force; and none others have been suggested, nor has the power of the legislature to enact it been otherwise questioned. Under the decision in *State ex rel. vs. Railroad*, 48 Missouri, 468, affirmed in *St. Jo, &c., Railroad vs. Shambaugh*, 106 Missouri, 569, cited on page 60 of my brief, the power of the legislature, under the Missouri constitution of 1865, to *amend* a corporate charter, previously granted by special Act, is not open to question, nor has it been questioned in this case. The decisions in *State ex rel. vs. Draper*, 47 Missouri, 29; *State vs. Heidorn*, 74 Missouri, 412, and *State ex rel. vs. Miller*, 100 Missouri, 446, cited more fully in my brief, on page 83, are equally conclusive that under that constitution an Act plainly inconsistent with and repugnant to an Act previously passed, but which it does not expressly repeal, must be held to repeal the prior Act by implication. It is tolerably clear, I submit, that a legislative grant of corporate franchises to be held and enjoyed *for ever* is in the highest degree inconsistent with and repugnant to a prior Act limiting the enjoyment of those franchises to thirty years. The words *for ever*, when used in a grant, whether statutory or by private conveyance, have only one possible meaning, that of unlimited duration. Certainly I need not argue that proposition—indeed, as I have said, that much is conceded in the

brief on the other side, even in the argument I am answering. But it must also be conceded, according to settled and reasonable rules of construction, that those words were used by the legislature in their ordinary and obvious sense. When the legislature said *for ever*, the legislature meant *for ever*. They did not mean *nineteen years*, as my learned friend contends that they did. In other words, they intended to repeal the limitation in section 9 of the Act of 1857, and they did repeal it, by necessary implication.

What answer is made to this by my friend on the other side? He undertakes to meet our contention, on our own theory that the Act of March 26, 1868, is a valid Act, and to show that even then the Laclede charter expired in March, 1887. His argument then rests on the proposition that since the legislature, when they passed the Act of 1868, did expressly repeal section 6 of that Act, but did not expressly repeal section 9, it must have been their intention to leave the latter section in force, and, upon this assumption, the unlimited duration which he concedes to be the meaning of the words *for ever* is limited and cut down to thirty years by section 9. This contention is stated on page 128 of the printed brief for respondent. He assumes, for argument's sake, the validity of the amending Act of 1868, and that the Act of 1857 is to be read as though the new provisions of the Act of 1868 were incorporated therein. So reading it, the grant of "perpetual succession" in section 1 remains unchanged. The corporate rights and privileges originally granted by section 5 are to be held and enjoyed by the company *for ever*. Section 6, which gave the city its option to purchase the company's plant after twenty years, is expressly repealed; and section 9, which limited the duration of the original Act to thirty years, not being expressly repealed, remains in force. He then sums up the result in these words:

"Thus section 1 confers the capacity of immortality; section 5 gives the company unlimited duration, and section 9 limits the life of the company to thirty years after March, 1857."

If this were a correct statement of the result of that amendment of the Act of 1857, I should entirely concur in the comment he then makes upon it when he adds: "I seriously doubt if greater statutory inconsistency can be found in the laws of any State."

Certainly nothing could be more inconsistent, I might say more preposterous and absurd, than such legislation, if any such result had been intended or could reasonably or fairly be inferred from the language of the Act. It does not seem to have occurred to my learned friend that the inconsistency, the absurdity, of such a result simply demonstrates the unsoundness of the argument which leads to any such conclusion.

It is a very familiar and a very sound canon of construction that when two opposite interpretations of a given instrument or statute are offered, one of which is reasonable in itself, and by adopting it all parts of the instrument are made consistent and harmonious, while the acceptance of the other would lead to uncertainty, confusion, or contradiction, the former is for that reason to be preferred, *ut res magis valeat quam pereat.* The presumption is certainly very strong indeed against imputing to the legislature any such intent as would justify the sharp criticism of my learned friend. On the other hand, the construction which we place upon the Act of 1858 is not only reasonable in itself, but avoids all obscurity, all contradiction, and renders the whole Act consistent with itself and with the settled law of the State, as contained in the decisions of the Supreme Court. There was no reason whatever why the legislature should not extend the duration of those franchises without limit, if it saw fit to do so. The words employed were apt to that end, and unless that was the

legislative intent it is inconceivable why those words were used at all. If the legislature did not intend to extend but did intend to cut down the duration of that charter; if they intended not only to take away the additional thirty years conditionally granted in the sixth section of the original Act, but to limit the charter to 1887, only nineteen years off, which is my friend's contention, why did they use the words *for ever* in the amending Act? There was no need of those words for that purpose—no sense or meaning in using them. On the contrary, they could only obscure and apparently contradict the supposed intent. The original Act, in section 1, already granted "perpetual succession"—which, for argument's sake, I may concede to mean only "*continuous* succession," or "the capacity of immortality," as contended by my friend—and all other ordinary corporate franchises, and section 9 already established the limit of their duration in March, 1887, unless extended to March, 1917, under section 6, by the city's failure to purchase. That option was taken away by the express repeal of section 6, which is entirely consistent with our view that the legislature intended to confirm those franchises *forever* to the company.

If not, I repeat, why were the words *for ever* used at all? I submit, that until that question is clearly and satisfactorily answered, my learned friend's interpretation of the Act is not even plausible. It is no answer to say that the legislature must have intended to leave section 9 in force, because they did not expressly repeal it. That is begging the question. We reply that section 9 was already repealed by necessary implication by the words *for ever* in section 1 of the amending Act, and to repeal it again by another section expressly added for that purpose was entirely unnecessary; and so I repeat my question, and shall await with interest my friend's answer to it. Why did the legislature use the words *for ever* in section 1 of the Act of 1868? Why were those words put in that section at all, unless they were used in their ordinary and conceded sense,

to express and confer *unlimited duration*, thereby *ipso facto* repealing and getting rid of any other provision in the original Act, inconsistent therewith?

But, if your Honors please, aside from the reasons and authorities so far submitted for the relator, there is another, and, as we think, a conclusive answer to all the respondents' objections to the validity of this charter. We maintain that that question is *res judicata*. In three successive decisions of the Supreme Court of Missouri, to each of which the city of St. Louis was a party, this very charter, granted by the Act of March 2, 1857, *as amended by the Act of March* 26, 1868, was adjudged to be valid and in force. The latest of those three cases was a proceeding brought in the Supreme Court by the city of St. Louis against the Laclede Gas Light Company, relator here, *in October, 1890*, more than three years after, according to my learned friend, that company's corporate life had expired. It was held not only that this company was then existing "by virtue of a special charter granted March 2, 1857, *as amended by an Act approved March* 26, 1868," but that its charter was an irrepealable contract by the State.

So many questions remain to be discussed that I can only allude to these three cases, referring your Honors to the statement of them on pages 85 to 92 of my brief. They are the cases of *St. Louis vs. St. Louis Gas Light Co.*, decided in 1879, reported in 70 Missouri, page 69; *St. Louis Gas Light Co. vs. St. Louis*, decided in 1885, reported in 86 Missouri, 495, and *State ex rel. City of St. Louis vs. Laclede Gas Light Co.*, decided at October term, 1890, reported in 102 Missouri, page 473. In each of those cases, as your Honors will find by reference to my brief, the question of the validity of the Act of March 26, 1868, was directly involved. In the earliest of them, which was a suit brought by The City of St. Louis against The St. Louis Gas Light Company and The Laclede Gas Light Company, relator here, in the circuit court, that court held the Act of March 26, 1868, unconstitutional and

void under article IV, section 25, of the Missouri constitution of 1865, upon the same grounds as are here urged. But on appeal by the St. Louis Gas Light Co., to which it is proper to state that the Laclede Company was not a party, that judgment was reversed, the Supreme Court expressly holding valid the said amendatory Act of March, 1868. To the second of those suits the Laclede Gas Light Company was not a party, but the same question was involved and directly decided by the Supreme Court as bearing upon the validity of the so-called "tripartite agreement" of 1873 between the city of St. Louis and those two companies, the Supreme Court again expressly holding valid the Act of March 26, 1868, and affirming the extension by that Act of the franchises granted to this relator by the Act of March 2, 1857. The third suit was, as I have said, a direct proceeding by the city of St. Louis against the Laclede Gas Light Company, relator here, for a writ of *mandamus* to compel the latter to reduce the price of its gas, as required *by city ordinance approved March 31, 1899.* The company's return set up its charter, *as amended by the Act of March* 26, 1868, as an irrepealable contract of the State, in virtue of which it had the right to fix the price of its gas without any control by either State or municipal legislation. To this the city filed a general demurrer, which, upon full argument, was overruled and the writ denied, in an opinion reported in the 102d Missouri, page 483, which not only expressly held valid the Act of March 26, 1868, but cited and approved the decisions in the two former suits.

Under these circumstances, if your Honors please, we submit that the validity of the Act of March 26, 1868, is *res judicata*, and that the question of the continued existence in full force of the relator's charter, as contained in the Act of March 2, 1857, amended by the Act of March 26, 1868, is no longer open to controversy between the parties to this suit.

It is not necessary that I should occupy your Honors'

time in dwelling on the doctrine of *res judicata*. In my printed brief, on page 88, is cited a very clear and terse statement of that doctrine by the Supreme Court of Missouri in the case of *Chouteau vs. Gibson*, reported in 76 Missouri. Your Honors have held the same doctrine in repeated decisions, some of them very recent, as in *Forsyth vs. Hammond*, 166 United States, page 518, and in *New Orleans vs. Citizens' Bank*, 167 United States, 396, and in *Southern Pacific Railway vs. United States*, decided in November last, reported in 18th Supreme Court Reporter, on page 27 and following.

Relator's Charter Powers.

Assuming the validity and unlimited duration of the relator's charter, the next question is as to the nature and extent of its corporate powers under that charter. That depends, of course, upon the construction or interpretation proper to be given to the Acts which constitute that charter.

I need not remind your Honors of the general rule of construction, applicable to all statutes, which was laid down by Chief Justice Marshall in the great case of *Gibbons vs. Ogden*, and again by Mr. Justice Story in *Martin vs. Hunter's Lessee*, that the words used are to be taken in their natural and obvious sense and not in a sense unreasonably restricted or enlarged.

Nor is it needful to dwell upon the general rule, repeatedly announced and applied by this Court in construing the charters of private corporations, especially business corporations, for the purpose of determining the nature and extent of their corporate powers. Your Honors have repeatedly held, in substance, that such corporations, so long as they are in good faith carrying out the objects for which they were incorporated, may not only exercise all powers specifically granted to them, but may exercise all powers and enter into any contracts incidental to those objects, reasonably construed, and necessary or proper for their at-

tainment. Thus in the case of *Fort Worth City Company vs. Smith Bridge Company*, 151 United States, 301, it was held that a company incorporated for the purpose of acquiring, laying out in lots, and selling a tract of land, and not for the purpose of building bridges, nevertheless had power to contract for the building a bridge over a stream separating its lands from an adjacent city, as a means of making its lands more accessible and salable. So in *Jacksonville Railway vs. Hooper*, 160 United States, 525, it was held that a railway company might contract for the erection and maintenance of a hotel at its terminus with a view to attracting tourists and increasing the business of its road. The same doctrine was applied by your Honors in *Green Bay, &c., R. R. Co. vs. Union Steamboat Co.*, 107 United States, 98, and in *Thomas vs. R. R. Co.*, 101 United States, 71.

The same doctrine has been repeatedly announced by the Supreme Court of Missouri in decisions several of which are referred to in my brief. In *Henning vs. United States Insurance Co.*, 47 Missouri, 432, that court said:

"Corporations, where they are not restrained in any particular manner by their charter, may adopt all reasonable modes in the execution of their business which a natural person may adopt in the exercise of similar powers."

In *Kitchen vs. Cape Girardeau, &c., R. R. Co.*, 59 Missouri, 517, it held that—

"In the absence of charter restrictions, the power of a corporation to make contracts is usually measured by the general objects and purposes of the incorporation. It is always presumed that a corporate body may make any proper contract whose scope and tendency are manifestly to forward the design of its legislative creation."

These are the general rules of construction by which is to be tested the relator's right to exercise the corporate powers and privileges which it claims, but which the respondents here deny that it possesses.

What is the general object for which this company was incorporated? There can be no doubt or dispute about that. It was incorporated for the manufacture and sale of artificial light; for the purpose of lighting the city of St. Louis—that is to say, of illuminating the streets, public places, and municipal buildings of that city; and also—which is a different thing—for the purpose of supplying artificial light, and the means of producing it, to private consumers in that city. There is no necessary connection between the two; but it is expressly authorized to exercise both these powers or privileges. By the original Act of incorporation express authority was given to this company and to the city of St. Louis, if such authority were needed, to enter into all contracts for the lighting of the city which they might choose to make. That particular section was repealed by the Act of 1868; but, as the Supreme Court held in the case in 86 Missouri, 499, cited on page 89 of my brief, the power still remained, under section 5 of the charter to exercise all necessary powers for carrying out the objects of the corporation.

Of course, the relator does not claim that the city is under any obligation to contract with it for city lighting, whether by gas or electricity, and expressly disclaims in its petition any exclusive right under its charter. Relator, as the petition states, is now lighting part of the city by electricity under a contract with the city; but if there were no such contract, or it should expire and no other be made with the city, the denial of relator's charter rights here complained of would still affect relator's business with private consumers.

If, then, this is a company incorporated for the production and sale of artificial light, and has whatever powers may reasonably be exercised for the purpose of attaining those objects, it is manifest that it has, on general principles, the right and corporate power, unless there be some restriction in the charter, to manufacture artificial light in whatever practicable and otherwise lawful method in which that

purpose may be carried out. That is the only reasonable construction of the charter, according to the rules already referred to.

But I should like to call more particular attention to the grants of power in the charter. First, the company is expressly empowered to carry on the business of lighting the city of St. Louis; secondly, to carry on the business—which is a distinct thing—of making and vending gas, gaslights, and gas fixtures, and any substance or material that may be now or hereafter used as a substitute therefor—that is, as a substitute for gas, or for gaslight, or for gas fixtures. Its express corporate powers include the making and vending those three things, gas, gaslights, and gas fixtures, and also the making and vending of any substitute which then was or might thereafter be used for any of those three things; and *to that end* the further express power is granted to the company to lay down anywhere within the corporate limits of the city of St. Louis all pipes and fixtures *or other thing properly required* for the exercise of the powers so granted: *Provided*, that this must be done with as much dispatch and as little inconvenience to the public as possible. Of course, if your Honors please, we recognize that condition to the fullest extent. I shall have something more to say on that point later. But, subject to that sole condition, here is an express grant from the State of the power to make artificial light and to furnish such light for the illumination of the city of St. Louis, its streets and public buildings, and also to make and furnish artificial light for the purpose of illuminating private buildings and supplying private consumers; and for that purpose the company is expressly empowered to make and vend not only gas, gaslight, and gas fixtures, but also any substance or material then or thereafter used as a substitute for gas, or for gaslight, or for gas fixtures.

I submit that it would be impossible to frame a grant of power to make, supply, and sell artificial light in broader

terms than these. The purpose expressed and the power granted was to make artificial light, not only as it was then commonly made, by using gas, but to make it in any other way, and by using any other substance or material which then was or might thereafter be used as a substitute for gas. What broader terms could have been used? The company was told, in effect, "Your business is to furnish artificial light; you may make and furnish it by means of illuminating gas or by the use of any substitute therefor that you may find practicable." That is the general proposition on which we ask your Honors to base the construction of this charter, so far as the corporate objects and powers of this company are concerned.

The next express grant of power related to a very important practical matter—the conveyance or transmission of the illuminant, the means or material for producing light to the innumerable distant points throughout the city where it would be needed, both for public and private use. That is another distinct right or privilege granted in these words, as amended in 1868:

"And *to that end* may establish and lay down, within any portion of said corporate limits as now or hereafter established, *all pipes, fixtures, or other thing properly required in order to do the same* (the same to be done with as much dispatch and as little inconvenience to the public as possible)—"

And that is followed by another and very general grant:

—"and shall also have all other powers necessary to execute and carry out the privileges and powers hereby granted to said company."

In *St. Louis Gaslight Co. vs. St. Louis*, 86 Missouri, 499, just now referred to, the Supreme Court of Missouri held that this was a distinct and substantive grant of power under which, notwithstanding section 6 of the Act of March 2, 1857, was repealed by the Act of 1868, the relator had

power to enter into the contract known as the "Tripartite Agreement."

Electricity.

But at this point is interposed the objection of the respondents that though the relator may have corporate power to lay pipes for gas, it has no right to lay pipes for electric wires, because, they say, it has no right *to make or vend electricity;* inasmuch as its corporate rights and franchises are confined to making and vending gas, gaslights, gas fixtures, and any substance or material used as a substitute therefor, and electricity, it is said, is not a substance or material.

In other words, unless the relator is able to answer the question, "*What is electricity?*" and to show that it is a substance or material, it has not corporate power to make or vend *electric light.*

I take issue with that proposition. I deny that either the nature or the extent of the relator's corporate powers under this charter depends upon its ability to solve a scientific conundrum. For the purpose of construing this charter or determining what rights and powers it confers, the question, "*What is electricity?*" is absolutely irrelevant. The true question is, and it is a practical question, a simple question of fact—

"*Is electric light a practicable substitute for gaslight?*"

If it is, then the relator has the corporate right and privilege of making and vending electric light. So far as relator's corporate powers are concerned or the true construction of its charter, it does not make the slightest difference what *electricity* is—whether it is or is not a substance, or a material, or a mode of motion, or a mysterious energy, or any other inscrutable entity. A very simple illustration, I think, will make that clear.

Suppose that the relator, in virtue of its admitted corporate power of lighting the public streets of St. Louis with gas, should offer to obligate itself by contract with the city

during a certain period, for a specified annual sum, to erect and maintain a specified and sufficient number of gas lamps on the several streets, to keep them in proper condition, to supply the necessary quantity of gas, *and also to light the lamps every evening, and see that they were kept burning during so many hours of each night?*

Would there be anything *ultra vires* in such a contract by the relator under this charter? Such contracts are constantly made by such companies with the authorities of cities and towns, and are supposed to be clearly within the corporate powers as well as for the benefit of both parties.

But then suppose that some uncommonly astute person, some *leguleius cautus et acutus*, should object that though its charter authorizes relator to make and vend gas and gas-lights and to light the city, it nowhere authorizes the company to make or vend *heat*, or to make use of that mysterious agent or form of energy or mode of motion in order to bring the gas into a state of combustion or incandescence. He might admit, he would have to admit, that except by the application of heat the gas could not be made to fulfill the purpose for which the company was empowered to make and vend it. But he might still insist that this company has no charter right or privilege of making or vending heat; and that unless it can answer the question, "*What is heat?*" and show that heat is a substance or material used as a substitute for gas, the company has no charter power to employ it in any way, for any purpose.

I imagine that my friend, the city counsellor, would smile at such an objection, as he well might. But if that contention would not be tenable in reference to *gaslight*, why should a precisely similar contention as to *electric light* be any more so?

I called your Honors' attention yesterday to the averments in the relator's reply in reference to the production of artificial light by the application of what is called *electricity*, whatever that may be, to pure carbon in the form

of rods or filaments, instead of producing light by applying *heat*, whatever that may be, to carbon in its compound form of illuminating gas. That these averments are true stands admitted on the record. If they were not so admitted, this court would take judicial notice of them, as it took notice in *Brown vs. Piper*, 91 United States, 37, cited on page 106 of the brief for relator, of physical facts in reference to the effects of cold and freezing mixtures, much less generally known. I need not repeat those averments in detail. They establish the physical fact that artificial light is and must be produced by bringing some suitable substance or material to a state of incandescence or white heat; that gaslight is produced by applying heat to illuminating gas, a compound of carbon, thereby decomposing it and setting the carbon free in fine particles which become incandescent, while electric light, which is an approved substitute for gaslight and a better illuminant, is produced by applying what is called electricity to pure carbon in the form of prepared rods or filaments, which are thereby made incandescent. In both cases carbon is the substance or material used. The object is to bring it to a state of incandescence, thereby producing artificial light, the production of which is the object for which this company was incorporated. Its charter contains no restrictions as to the methods by which or the conditions under which that object may be attained, whether by applying heat, whatever that may be, to carbon in the form of gas, or by applying electricity, whatever that may be, to carbon in a different form. The company, under the rules I have cited and under the general grant of "all necessary powers," has equal right to use either heat or electricity or any other agent, energy, force, or mode of motion for the purpose of producing artificial light by bringing to a state of incandescence either carbon or platinum or any other substance or material suitable for that purpose. As I have said, it is upon that broad and practical view of its corporate objects and corporate powers that I rest the argument for the relator

on this branch of the case. In that view of the controversy, I repeat that it is absolutely immaterial whether electricity is or is not a substance or material, or what it is or what it is not.

If time permitted, I might be tempted to consider some of the grounds upon which my friend maintains that electricity is neither a substance nor a material. For example, on page 144 of his brief it is said: "A substance or material is tangible; electricity is not." As to the word "substance," I take leave to question this statement from the point of view not only of accurate definition, but of etymology, of theology, and of metaphysics. On the question of definitions the lexicographers are entitled to speak. I find in Webster's Unabridged Dictionary six definitions of the word "substance," of which only two apply to things tangible. The Century Dictionary, the latest and best authority, gives it ten different meanings, of which only two include anything tangible, being the same two that Webster gives. Of the rest at least one is removed to an infinite distance from any material conception. It defines the word as used by theologians—"the divine being or essence"—and its authority for this is found in that most ancient and venerable of all professions of Christian faith—the Nicene creed—in those words which represent the second person of the Trinity as "of one *substance* with the Father." I need not remind your Honors of the circumstances which attended that solemn declaration, transmitted to us through all the vicissitudes of sixteen centuries; of that great assemblage of the bishops and fathers of the church from Africa, from Asia, from farthest western Europe, convened and presided over in person by the Roman emperor, the first Christian emperor, Constantine the Great, victorious over all enemies in the field and eager with the ardor of a new convert to achieve new conquests in the world of faith; of the picturesque and historic figures of Arius, defeated, proscribed, and exiled as a heretic, and of his great adversary, Athanasius, just entering upon

that long and stormy career in which he so often stood alone, *Athanasius contra mundum*, Athanasius against the world. Your Honors will remember how great a part was played in that fierce controversy by the Greek word *hypostasis*, the exact etymological equivalent of the Latin word *substantia*, which we turn into English as *substance*, and which literally means that which stands under or among—the primary definition of it being "that which exists by itself, and in which accidents inhere." In that metaphysical sense it is defined by John Locke, in his Essay on the Human Understanding, as signifying "something whereof we have no particular distinct, positive idea, but which we take to be the substratum or support of those ideas we do know." And again: "So that of *substance* we have no idea *what it is*, but only a confused, obscure one of *what it does*." But if that be the definition of *substance*, then electricity is a substance, for our knowledge concerning it cannot be better described than by confessing that we do not know what it is and have not a very clear idea of what it does. And is not that just as true of heat? But this we do know, that by means of heat, and also by means of electricity, whatever either of them may be, carbon, which is a material, can be made incandescent and artificial light produced. And the production of artificial light from carbon, or from any other material, is within the corporate objects, and therefore within the corporate powers, of this relator.

Other Charter Powers.

Assuming, then, if your Honors please, not only that the charter is valid, and that the company is not a ghost, but that it is entitled to enjoy the charter rights and privileges it claims, we come to the violation, as we claim, of our charter rights by the enforcement of this ordinance.

Your Honors will remember that I read yesterday from the opinion of the Supreme Court of Missouri, rendered at

an interlocutory stage of this case, not upon the final demurrer and not discussing the new matter set up in our reply, the conclusion of the court, as follows:

"*As the case is now presented*, we must hold that the city, under its power to regulate the use of streets and under its general police power, has the right to require a compliance with regulations *which either wholly prohibit relator from laying its wires under the streets* or which regulate the manner in which it may be done."

Mr. Chief Justice FULLER: Is that word "either" or "neither?" In what volume of the Missouri Reports is the case reported?

Mr. HITCHCOCK: As it is printed in my brief, it is "either." I will look at the record and see which it is.

Mr. Chief Justice FULLER: Mr. Marshall, how is it in the volume of reports? Can you give a reference to the volume?

Mr. MARSHALL: I have not the volume of the reports, sir.

Mr. Chief Justice FULLER: Was not the opinion published?

Mr. MARSHALL: Yes, sir.

Mr. Chief Justice FULLER: In what volume of the Missouri reports is that opinion printed?

Mr. HITCHCOCK: I have forgotten the volume, sir. I have not referred to it.

[After referring to the printed record, Mr. HITCHCOCK stated that the word in question appeared there as "neither," but that this was evidently a mistake for "either."

Mr. Marshall presently produced volume 130 of the Missouri reports and informed the Court that, according to the official report of the opinion in this cause as therein published, the word in question (on page 27 of said volume) is not "neither," but "either."]

Mr. HITCHCOCK continued:

Our contention is, then, may it please the Court, that the judgment of the Supreme Court of Missouri denying the writ of *mandamus* applied for, and the consequent enforcement of the city ordinance set out in the relator's reply, and which was in fact the sole ground upon which permission was refused by the city of St. Louis to this relator to lay its pipes in the streets, impairs the obligation of our contract with the State. We insist that the relator possesses charter rights and powers essential to its corporate purposes which cannot be carried out, cannot be exercised, if that ordinance be enforced.

And, first, I call your Honors' attention to the fact that by the provisions of *that ordinance alone* has the city of St. Louis attempted, as against this company, to assert the powers it here relies on. That ordinance alone was pleaded by the city, independently of certain objections to the charter to which the court below paid no attention, assuming expressly that they had no force. That court passed only upon the question, whether or not the city had the right to forbid the laying of these pipes, the relator having failed to comply *with that ordinance*, and held that it had. In other words, assuming the relator's charter to be valid and to confer the powers it claims, I respectfully submit that the question presented by this record is,—Whether the ordinance here complained of—not some part of it, or some possible modification of it, which might perhaps be reached if this were a suit in equity, but the whole ordinance as it stands, with all its conditions and requirements—can be enforced against the relator without violating its constitutional rights? It is very important, I respectfully submit, that this be recognized as the real controversy here.

Of course, we do not question the powers of the city within their constitutional limits, and when exercised with due regard to our charter rights; but we respectfully insist that the enforcement of this ordinance is a denial of relator's

rights under its charter, which are essential to the objects and purposes of its corporate existence. And if, as relator claims, that charter is an existing and valid contract by the State of Missouri, then such denial is a violation of the relator's rights under the Constitution of the United States.

That ordinance was for the first time set out in full in the reply of the relator, having been pleaded only in part in the return of the respondents.

As I have pointed out, the corporate powers granted to the company include not only the general right of carrying on the business of making and selling artificial light, including the right or privilege of lighting the city of St. Louis, which, as the petition shows, is not an exclusive right, and must be execised, if at all, under some contract with the city, also including the right and privilege of supplying artificial light to private consumers, but also, *to that end*—that is, to the end that it may freely and successfully exercise those privileges—the further right to establish and lay down in any part of the corporate limits of said city—I am now quoting the words of the grant—

"All pipes, fixtures, or other thing properly required in order to do the same, the same to be done with as much dispatch and as little inconvenience to the public as possible."

The right of the relator under that grant to lay and use *gas pipes* under the streets is not denied. On the contrary, the respondents' return avers that the company had been in the habit of laying underground gas pipes. The question is upon the relator's right to lay pipes under the streets in which to place suitable wires for the transmission of electricity for the production of electric light as part of its business as a lighting company.

I call attention, also, referring to the words "or other thing properly required in order to do the same," to the fact that the respondents' return avers that in order to convey electricity it is necessary to carry the same by means of

wires strung on poles overhead, "or by means of wires strung in non-conductive tubes or conduits beneath the surface of the streets." Respondents thus admit that the pipes the relator wish to lay are something "properly required" for the purposes named in its charter. Moreover, the court below in its opinion deemed it proper to state the fact as of public notoriety, that the question is now under consideration, whether the public safety as well as convenience does not require these wires to be placed under ground.

If, then, relator has the right to furnish electric light, and has the right to lay pipes, it has the right under this grant to lay pipes under ground, because they are something "properly required," and it is to that end that that corporate power was given. In other words, when the State granted to the relator those corporate powers, that grant unquestionably included the right to lay down under the city streets, in suitable conduits, wires suitable for the production of electric light.

I also call your Honors' attention to the fact that in the relator's reply it not only set forth in detail the methods of producing electric light, but also averred in detail the mode in which it intended to lay those pipes, their dimensions, the space to be occupied, and the manner of their construction; and it was further expressly averred that they were the best practicable methods of conducting electric wires for lighting.

Your Honors will at once perceive the importance of these allegations with reference to the question of the police power, upon which in part the conclusions of the court below were based. They were necessary allegations, not only from that point of view, but also in view of the condition in the grant to relator, that the right expressly conferred upon it, "to that end," namely, to the end that its lighting business might be successfully carried on—the right to establish and lay down all pipes, fixtures, or other thing properly required in order to do the same—shall nevertheless be ex-

ercised with as much dispatch and as little inconvenience to the public as possible.

Now, this record leaves no doubt, if your Honors please, on that point. It eliminates that question from the case. In the first place, the petition expressly averred that the work it desired and intended to do would be done in the best and safest manner; that its purpose in substituting under-ground wires for the overhead wires it was already using, with the city's consent, for furnishing electric light not only to private consumers, but to the city itself, under a contract with the city for lighting the streets by electricity, which has some years yet to run, was to avoid the increasing inconvenience and danger to the public necessarily incident to the use of overhead wires; that in order to provide more effective and proper service, it, relator, had made arrangements to lay its wires under ground along and under the city streets in the most approved and practical manner, and that it was ready to do so with as much dispatch and as little inconvenience to the public as possible.

This challenge was not accepted by the respondents. Not one of these allegations was put in issue either by way of specific or of general denial, though divers other allegations were denied. They therefore stand admitted of record.

But the relator's reply, as I have pointed out, goes still further into details as to the method of constructing the proposed pipes or conduits, and expressly avers that they are of the most approved description, such as are used for like purposes elsewhere; that when completed and in use they will offer no obstruction whatever to travel and traffic, and that by their use the danger to life and property attending the overhead wires now used by relator under contract with the city will be entirely avoided. All these allegations are admitted by the demurrer to the reply first filed by the respondent Murphy and afterwards adopted as its own by the city of St. Louis.

But if, as we contend, relator has the right and privilege under its charter to make and vend electric light, and to that end to lay suitable wires under ground in conduits or pipes, that right is a corporate franchise, and the grant of that right contained in its charter is a contract by the State.

In the leading case of *New Orleans Gas Light Co. vs. Louisiana Light Co.*, 115 United States, 650, your Honors held that the right to lay gas pipes in the streets of a city was a franchise or privilege which can be granted only by the State or by the municipality acting under legislative authority; and further held that such a grant by the State is—

"none the less a contract because the manufacture and distribution of gas, when not subjected to proper supervision, may possibly work injury to the public, for the grant of exclusive privileges to the plaintiff does not restrict the power of the State or of the municipal government of New Orleans, acting under authority for that purpose, to establish and enforce *regulations which are not inconsistent with the essential rights granted by plaintiff's charter*, which may be *necessary for the protection of the public against injury*," etc.

That ruling touches the vital point of this case. It recognizes the duty of the city and the State to protect the public against actual injury, but it requires also that rights granted by the State and guaranteed by the Constitution shall not be denied under color of the police power.

Other decisions of this Court maintain the same doctrine. In *New Orleans Water Works Co. vs. Louisiana Sugar Refining Co.*, 125 United States, 18, your Honors held that a city ordinance regulating corporate franchises, if adopted in pursuance of authority granted by the State, is the act of the State, and if in excess of its power to regulate or modify such franchise, is void.

In the brief for relator, on pages 110 and following, this subject is discussed more fully than time now permits, and I beg leave to refer your Honors to the cases there cited from the Missouri reports, in which the limits of the police

power in respect of corporate franchises and vested rights are strongly stated, in entire harmony with the decisions of this Court.

I would also refer in this connection to the important case of *Pearsall vs. Great Northern Railway Co.*, 161 United States, 646 and following, decided by this Court since the former argument of this cause. In that case your Honors very fully considered the nature of corporate franchises and the extent to which and the circumstances under which they are vested rights protected by the Constitution.

After referring to the Dartmouth College case and reviewing many later decisions, the opinion says, on page 661 :

"Subsequent cases have settled the law that wherever property rights have been acquired by virtue of a corporate charter, such rights, *so far as they are necessary to the full and complete enjoyment of the main object of the grant, are contracts* and beyond the reach of destructive legislation."

Again, on page 662, citing with approval the case of State Bank of Ohio *vs.* Knoop, 16 Ohio, 369, it is said :

"In this connection it was said by Mr. Justice McLean : 'Every valuable privilege given by the charter, and which conduced to an acceptance of it and an organization under it, is a contract, which cannot be changed by the legislature where the power to do so is not reserved in the charter.'"

On page 663 it is held that the principle includes grants of an exclusive right to supply gas or water to a municipality, or to occupy its streets for railway purposes ; citing the *New Orleans Gas case*, 115 United States, 650, and other decisions of this Court ; and later, on page 673, after defining what constitutes a vested right according to familiar and settled rules, it is said :

"As applied to railroad corporations, it may reasonably be contended that the term extends to all rights of property acquired by executed contracts, *as well as to all such rights as are necessary to the full and complete enjoyment of the original grant or of property legally acquired subsequent to such grant.*"

That the relator's right, under its charter, to lay underground conduits for its electric light wires falls within these principles surely is too clear to require argument.

On the other hand, in that same case and in connection with these clear and strong statements as to the nature and the sanctity of such rights, your Honors pointed out that the protection of such rights which is guaranteed by the Constitution is entirely consistent with legitimate control by the legislature, because, as is said on page 665—

"Statutes which operate only to regulate the manner in which the franchises are to be exercised, *and which do not interfere substantially with the main object of the grant*, are not open to the objection of impairing the contract."

I would also recall to your Honors in this connection the case of *Louisville & Nashville Railroad vs. Kentucky*, decided about the same time with the *Pearsall case*, and reported in 161 United States, 700, in which the same principles were applied.

In the case at bar no question can arise as to any power having been reserved by the State to modify or repeal the relator's franchises. As I have fully shown, this charter is, and has been held by the Supreme Court of Missouri to be, not subject to legislative repeal or alteration.

But I would call your Honors' attention to another and important feature of the cases just cited, the *Pearsall case* and the *Louisville and Nashville Railroad case*, to which I may add the *New Orleans Gas case*, 115 United States; the case of *New York and New Haven Railroad vs. Bristol*, 151 United States, and the recent case of *Baltimore vs. Baltimore Trust Co.*, 166 United States, 684, namely, the requirement that no exercise or alleged exercise of the police power by way of regulating corporate franchises such as I have mentioned can be sustained *unless that power is exercised in good faith.*

In the *Baltimore Trust Co. case*, in 166 United States, the regu-

lation complained of affected the franchise of a street railroad company, and the city claimed the right to enforce it under the power to regulate the use of streets—a claim also made in this case by the city. Your Honors, upon the facts of that case, upheld that regulation; but the general rule was thus stated on page 684:

"This power of regulation of the use of streets is a continuing power; it is not exhausted by being once exercised, *and so long as the object is plainly one of regulation*, the power may be exercised as often as and whenever the common council may think proper; the use of the street may be subjected to one condition today and an additional one tomorrow, *provided the power is exercised in good faith and the condition imposed is appropriate as a reasonable regulation, and is not imposed arbitrarily or capriciously.*"

So in *Louisville & Nashville Railroad vs. Kentucky*, 161 United States, 700, after citing some cases in which State laws were held void as impairing the obligation of contracts, the opinion proceeds:

"These cases, however, do not infringe upon the general rule so frequently declared, that *where the police power is invoked in good faith* for the prohibition of a practice which the legislature has declared to be detrimental to the public interests, it will be sustained *wherever it can be done without the impairment of vested rights.*"

These decisions, I submit, are very pertinent to a case in which, as I have pointed out to your Honors, the record not only does not show, but absolutely negatives, any interference by the relator with the public convenience or safety by the construction or use, in the business authorized by its charter, of its proposed conduits; or that they would occupy an unreasonable space in the public streets, or exclude others from a like use of the streets, so far as the nature of the case permits, if the city authorities should authorize such additional use; or would have any effect or cause any inconvenience whatever, to prevent which either the power to

regulate the use of streets or the police power could be legitimately and in good faith invoked.

Again and again, in these cases which I have cited and in others, now holding one State law void and now holding another State law valid, this doctrine has been steadily applied with the firm and even hand which has distinguished the decisions of this great tribunal from its foundation. The police power, your Honors have many times said, may always be invoked for the safety and protection of the people against wrong; but it must never be invoked or exerted arbitrarily or in disregard of rights guaranteed by the Constitution.

Objections to the Ordinance.

With your Honors' permission I will now briefly consider the actual provisions of this ordinance, but would also respectfully refer to the careful analysis of it on page 112 and following of my brief.

It is an ordinance declaring the conditions upon which, and upon which only, any person, corporation, or association can obtain the right and permission to place electric wires or cables along, across, or under any street in St. Louis. One important feature of it is that those conditions are so strictly connected with and dependent upon each other that without fulfilling each and every one of them in the order prescribed such permission cannot be obtained by any one.

Now, the very first of these conditions is that the corporation desiring such permission shall have been *duly authorized by the Municipal Assembly to do business in the city of St. Louis.* All the subsequent conditions are based upon and expressly require this condition precedent to be fulfilled.

I trust that your Honors clearly apprehend the relation of the Street Commissioner to this matter. His duties in reference to street excavation might, perhaps, be likened to the duty of a sentinel or of a doorkeeper. He is the city official having the sole immediate charge

and supervision of the streets. Under the ordinance (section 568 of the Revised Ordinance) set out in the petition, no person can lawfully make any excavation in any street without written permission from the Street Commissioner, excepting public work done under the authority of the Water or Sewer Commissioner, and even they must notify the Street Commissioner of any excavation ordered by them.

Relator, deeming its charter sufficient authority, and having, as the record shows, first notified the Street Commissioner of its purpose, sent some workmen to begin the necessary excavation. He had them arrested by the police and notified relator that no excavation could be made without a permit from him. Relator then applied to him for a permit to excavate, so that it might lay its wires as authorized by its charter. He refused to give relator a permit to excavate any street for any purpose, and threatened to arrest any one who should attempt any excavation for relator. He refused it because relator had not complied with the ordinance here complained of, and on that the issue was joined.

Mr. Chief Justice FULLER: Had you made application to the Board of Public Improvements?

Mr. HITCHCOCK: No, sir; I am referring to the Street Commissioner. The Board of Public Improvements, under sections 605 and 606 of that ordinance, is authorized to approve plans submitted by any person or corporation *duly authorized by ordinance to do business in the city of St. Louis*, and desiring to place its wires in the streets. But a preliminary step, without which the Board of Public Improvements has not even the right to look at plans, is that the Municipal Assembly must first by ordinance authorize such person or company. That is the first step, and unless that authority has been given by the Municipal Assembly, the Board of Public Improvements has no right to look at, and will not look at, any plans submitted by any corporation.

That is our first grievance. That is the denial at the very root of our charter rights.

The conditions prescribed by the ordinance here in question are these. They are carefully analyzed and stated on pages 112 to 115 of my brief. The party desiring to exercise that right must first obtain authority from the Municipal Assembly of St. Louis to carry on the business; then it must have its plans approved by and obtain a permit from the Board of Public Improvements; then it must file with the city register an acceptance of all the terms of that ordinance, which, in our case, would have acknowledged the unqualified right of the city to prescribe all the conditions upon which we might carry on the business of furnishing electric light; then it must give bond in the sum of $20,000, to be filed with the city register and approved by the mayor and council, one of the conditions of which is to file sworn statements semi-annually and pay to the city treasurer 5 per cent. of its gross receipts, and must also agree to comply with all ordinances thereafter to be passed in relation to the subject.

Now, we say that these requirements strike at the very root of our charter power. If we have to go before the Municipal Assembly and get their consent as a condition precedent to exercising that right, they may refuse their consent; and if they refuse their consent, what is our charter right worth? We found out what it was worth on that theory. We had no alternative but to apply to the courts. The very first condition of that ordinance was a denial of our right to carry on the business of electric lighting unless the city authorities saw fit to approve the permission given to the relator by the State of Missouri. The city must approve our charter rights or they are annulled.

But, in addition to this general and fundamental objection, we submit certain specific objections, which I will mention, asking leave to refer your Honors for a fuller statement

of them and the authorities cited to pages 117 and following of my brief.

The first of these objections is that the power to regulate the use of streets conferred by the city charter is a power which the charter expressly says must be exercised *by ordinance*. Your Honors will find in a clause of section 2 of the article set out in the respondents' return that the Mayor and Municipal Assembly shall have power by *ordinance* to do a good many things—among others, to regulate the use of streets. I have quoted in my brief a list of cases decided by the Supreme Court of Missouri, in all of which it was held that this power cannot be delegated, but must be exercised by ordinance. The doctrine is a familiar one, and I will not now detain your Honors with citations, but beg to refer to my brief for the cases we rely on.

We object to this ordinance, therefore, on the special ground, set up in relator's reply, that it does not exercise the power to regulate the use of streets, but attempts to delegate that power to the Board of Public Improvements. In other words, it is an attempt to delegate power which cannot be delegated; and since the action of that Board is an essential step in the proceedings prescribed by the ordinance, the ordinance is void for that reason.

The next specific objection we make is one I have already foreshadowed. It is claimed that this is a power to regulate the city streets. It is not an exercise of the power to regulate; it is an exercise of the power to prohibit. As I have already shown, this ordinance forbids the relator to exercise essential rights under its charter, unless the city consents to it. But that is a power of prohibition, not of regulation.

At this point, if your Honors please, I may as well say, although I must speak briefly, that the relator fully recognizes and desires to meet its own obligations to the State, the city, and the public, including the limitation upon its powers contained in the charter itself. It has the right

under its charter to carry on the lighting business, and to that end to establish and lay down all pipes, fixtures, or other thing properly required therefor, but with the condition that the same be done with as much dispatch and as little inconvenience as possible to the public. We fully recognize that obligation; but, as I have already shown, there is nothing in this record which tends to show, nor has it been or can it be claimed in this case, that that condition has been or was or is likely to be violated; and, if not, then on what ground, by what right, can the relator be lawfully forbidden by the city, or by the State, or by anybody, to exercise the essential rights held under its charter?

But it may be asked, "Do you claim that this company is a chartered libertine which has the right to go into the streets of St. Louis and tear them up at pleasure?" Certainly not. No such right is asserted. No such privilege is sought in this proceeding. The writ of *mandamus* prayed for conforms strictly to the conditions of the relator's charter and to the official powers and duties of the Street Commissioner, who is the only city officer authorized to issue such permits. All the relator asks is that the rights granted to it by the State shall not be annulled and destroyed by the city, by imposing conditions which the State did not see fit to impose. The condition imposed by the State is that relator shall exercise these rights with due regard to the convenience and safety of the public. No disregard of these is even alleged. If it should disregard them, it would, of course, be acting *ultra vires* and be subject to lawful control and restraint within the proper limits of its charter rights; but that this company should be restrained or prevented from exercising its charter rights at all, except at the mere will and consent of the Municipal Assembly of St. Louis—that is a totally different thing.

That distinction was recognized by his Honor Mr. Justice BREWER in his opinion in *St. Louis vs. Western Union Telegraph Co.*, on the rehearing, in the 149th United States.

There the question was raised as to the city's control of the streets. It was contended that the Western Union Telegraph Company had certain rights independently of the city; but his Honor held that it had not.

I read from his opinion on page 470:

"Unless, therefore, the telegraph company has some superior right which excludes it from subjection to this control on the part of the city over the streets, it would seem that the power to require payment of some reasonable sum for the exclusive use of a portion of the streets was within the grant of the power to regulate the use. That the company gets no such right from the General Government is shown by the opinion heretofore delivered, nor has it any such from the State."

His Honor then refers, on page 471, to the case of *Atlantic & Pacific Railroad vs. St. Louis*, 66 Mo., 228, cited by counsel, but holds that it is not pertinent to the claim of the Western Union Telegraph Company, which is not a Missouri corporation and has "no general or irrevocable power to occupy the streets in any city in the State through all time."

But every condition which his Honor found wanting in respect of the telegraph company in that case plainly exists in behalf of this relator. It is a Missouri corporation, having an irrevocable charter, which does give it a superior right to occupy, for the purposes and under the conditions limited in that charter, the streets of St. Louis; and the ruling in the *Atlantic & Pacific* case in 66th Missouri is not only pertinent, but conclusive, that its rights under that charter are not subject to be annulled by a city ordinance or at the will of the Municipal Assembly of St. Louis.

What these rights are I have endeavored, perhaps at too great length, to state to your Honors as we honestly conceive them. In behalf of my clients, I have emphatically disclaimed any purpose or desire to disregard the conditions annexed to the grant from the State, upon the faith of which

it has expended and its shareholders have invested great sums of money. I have as emphatically acknowledged the right and duty of the municipal authorities, in the event that it should disregard them, to take proper and lawful steps to restrain it from so doing.

Exactly in what manner that restraint might or should be exercised, if the occasion arose, of course it is not my province to discuss. I am not here to frame hypothetical ordinances or discuss hypothetical cases. I am here simply to point out, as I have endeavored to do, that the only method by which, so far as we are concerned, the city of St. Louis has yet undertaken to assert such control as may properly belong to it, is a method of destruction—a method which cuts our rights up by the roots. That is what we complain of. Whenever it shall appear that this company is overstepping its charter rights, has gone beyond its powers, then the city should be able to find some lawful way of restraining it, consistently with its vested rights and with your Honors' rulings in the cases I have referred to—the *Pearsall* case, and *Mugler vs. Kansas*, and *New Orleans Gas Light Co. vs. Louisiana Gas Light Co.*, and all that series of opinions referred to in my brief and perfectly familiar to your Honors, in which it has been consistently held that the police power must be exercised for its true ends, in good faith, with unfailing regard to the essential rights protected by the Constitution of the United States.

Another specific ground upon which we claim that the ordinance is oppressive, unreasonable, and void, is because another and essential condition of the ordinance is that the relator shall give bond to comply for all future time with whatever commands or demands the city of St. Louis may by ordinance prescribe. The city cannot lawfully require this company to enter into bond to give away its charter rights whenever they choose to demand it. I need not dwell on that proposition, for the principles on which it is based have been already stated.

Nor can the city lawfully impose upon the relator, as a condition of exercising its charter rights, the tax of 5 per cent. annually on its gross receipts, which this ordinance exacts. The power to tax is the power to destroy. If 5 five per cent., why not 75 per cent. or 100 per cent.? This condition of the ordinance is unlawful and void, as annexing to the enjoyment of relator's franchises a burdensome condition not imposed by the State, thereby impairing the obligation of the contract; nor can it be upheld as a reasonable regulation of the use of streets, for reasons stated in respect of a similar tax upon a street railroad company in *Mayor, &c., vs. Second Avenue Railroad Co.*, 32 New York, 261, cited in my brief; nor as a police regulation, on the grounds I have stated in reference to the limits of the police power.

One other matter I refer to, only in order to give my friend, Mr. Marshall, an opportunity to meet my criticism of a case upon which he seems to rely. Your Honors will find that the propositions discussed in my friend's printed brief on file are based upon the original demurrer of the relator to the return of the respondent, and are not based upon the joint demurrer to the relator's reply, ultimately filed by the street commissioner and adopted by the city after the city became a party. Of course, I am not finding fault with this, but simply noting the fact. It is the same brief which was submitted to the court below when the relator's demurrer to that return was argued, which was the only argument heard in that court. As I said yesterday, the court below, when final judgment was rendered, simply said, We rely upon our former opinion; and that opinion was based entirely on the respondent's return.

In that brief I find that my friend refers to the case of *New York vs. Squires*, in 145 United States, 175, as a conclusive answer to all our objections to the ordinance. I did not discuss that case in my brief on file in this Court because I really did not think it was necessary to answer it, but it

may be well to state briefly why we think that case is absolutely irrelevant to this controversy.

The Electric Lines Company, relator in that case, was organized in 1882, under the New York general telegraph law of 1848, as amended in 1853, which was a general corporation law. This company did not have a special charter and did not claim any special rights by grant from the State. Among the conditions prescribed in the Act was that it should obtain the consent of the municipal authorities before constructing its line on or under any street, road, &c.

In the return made by the respondent in the case at bar a similar provision is cited from section 2721 of article V, chapter 42, Revised Statutes of Missouri, 1889, as applicable to this relator. To this it was answered, in the reply filed by relator, that that section, 2721, is found in article V of the Missouri General Corporation Law, which purports to and does relate exclusively to telegraph and telephone companies organized under that article, and that therefore that provision was irrelevant to this controversy.

But in the New York case there was such a provision, and it did apply to the relator company. That company accepted that provision and agreed, in order to obtain permission from the city of New York to lay wires underground, to comply with certain conditions contained in a city ordinance adopted in December, 1878, prescribing in detail the method of constructing the conduits. Those conditions included, among other things, the filing of a map and diagram, and its methods of construction were subject to the approval of the Commissioner of Public Works. In *May, 1883*, the company did file a map and diagram, but it took no further step until *July, 1886*. It then applied to the Commissioner of Public Works for a permit to excavate streets, claiming that it had the right, having complied with the provisions previously in force, to obtain that permit. The Commissioner refused, because in the meantime, after the map, &c., had been

filed, in May, 1883, and before the company applied for that permit, two other amending Acts had been passed, amending the general law, which of course the legislature had the right to do at any time, creating a new Board of Electrical Subways. The new Act provided that all plans and diagrams of that kind should be submitted to and approved by this new body, and not, as before, by the Commissioner of Public Works. The relator company had not, when it asked for a permit, asked or obtained the approval of the Board of Electrical Subways. The Commissioner of Public Works refused the permit on that ground. They went into court to procure a *mandamus* on the ground that they were not obliged to submit their plans to the Board of Electrical Subways created under the Act of 1885, because in 1883, when they accepted the terms and conditions then existing, they had filed a diagram. The courts in New York ruled against them, and this Court affirmed their judgment, for reasons thus stated on page 190 of 145th United States:

"The utmost that can be said against the Acts of 1885 and 1886 is that they transferred the supervision and control of the matters of excavation of the streets and the construction of underground electric systems from the Commissioner of Public Works to the Board of Subway Commissioners. That is the sum total of the change effected. Not a right of the electrical companies was violated and no contract was impaired. The expressly reserved power of the State or municipality to regulate the use of the streets and highways in such manner as not to injuriously affect the public interests was merely transferred from one public functionary to another. The power was not enlarged; only the agency by which the supervising power of the State was to be exercised was changed."

That is to say, in 1883 the company could go to the Commissioner of Public Works for his approval. In 1886 they were required to go to the Board of Electrical Subways for their approval of exactly the same thing. Their obtaining such approval was one of the express conditions on which

they were to obtain the permit, and that condition they had expressly agreed to abide by from the beginning.

I submit that there is no parallel between that case and this. That company was chartered under general law. We have a special charter with special rights. That company was organized under a general law which required it to obtain the city's consent, and it obtained that consent by accepting all the conditions of the city ordinance of 1878. We were not called upon to obtain the city's consent. On the contrary, we have permission granted directly and expressly by the State, without reference to the city and without requiring its consent, upon a condition which we aver we have fulfilled, which we are ready always to fulfill, and which it is not averred we have violated or even that we will ever violate. In that case there was no denial even of the rights they were entitled to. They were simply told in 1883, pursuant to the express conditions they had accepted, that they must get the approval of a certain officer, while in 1886 they were directed to get the approval of a different officer, but he was to approve the same plans and work, for exactly the same purpose. That was why your Honors affirmed that judgment. I am at a loss to see what pertinence that case has to the case at bar.

If your Honors please, these are, in substance, the grounds upon which we maintain that this ordinance ought not to be enforced.

CONCLUDING ARGUMENT OF MR. HITCHCOCK.

If your Honors please, I desire to say a few words in reply to Mr. Marshall.

In regard to his last proposition, about the Act of 1868, I do not care to repeat that discussion, but I am at a loss to understand what my learned friend means when he talks about putting both parties, the city of St. Louis and the relator company, back in the position they were. I under-

stand his position, so far as that option is concerned, to be this—and if I do him injustice he will correct me. He contends that the Act of 1868 was void. If so, of course section 6 of the Act of 1857 was never repealed. But Mr. Marshall claims that both parties have acted upon the idea that the Act of 1868 was valid, and that consequently the city did not exercise the option given to it, and it ought to have another chance—that is to say, the Act was void, yet nevertheless it had the effect of somehow or other depriving the city of its right or option, and so the city ought to be put back into the position of exercising an option which, on their own theory, expired twenty years ago. I am absolutely unable to follow the logic of that proposition.

Mr. Marshall cites the decision in *State vs. Morrow*, 26 Missouri, 131, to sustain his contention that the Act of 1868 did not repeal section 9 of the Act of 1857 by implication. That case is not in point. In that case the amending Act, which repealed one provision of the former Act, contained nothing repugnant to or inconsistent with any other provisions of the former Act; hence the court declined to infer that any other provision was repealed by implication. But the Act of March 26, 1868, besides expressly repealing section 6 of the Act of March 2, 1857, in one section, also by another section so amended section 5 of the Act of 1857 as to be absolutely repugnant to and irreconcilable with section 9 of that Act. To such conditions the ruling in *State vs. Morrow* is wholly inapplicable, while the doctrine of *State vs. Draper* and *State vs. Miller*, on which we rely, is directly in point. And if it were held that those two cases announce a different rule from *State vs. Morrow* concerning repeals by implication, then those two later cases must be held to overrule the former.

Let me briefly refer to another point which I omitted in my opening, but can state just as well now. A good deal has been said by my friend about electric lighting being unknown to art in 1857. If your Honors please, without de-

taining you to read it. I simply ask your attention to the historical summary on that point contained in my brief, on page 99. This shows that in 1846 electric light was successfully employed on the stage in Paris, France, at the production of a famous opera; that in 1848 it was used in England to light a large public hall, and in 1852 to light the Liverpool docks; that in 1855 a principal quay at Lyons, France, was illuminated by electricity with great splendor and success, followed by an electric illumination of a *chateau* in Paris, also highly successful, in the same year, and in October, 1856, a still more magnificent illumination by electricity was carried out from the summit of the Arc de Triomphe de l'Etoile, one of the most conspicuous and famous public structures in Paris, by which the Avenue des Champs Elysees, one of its most famous streets, was illuminated for four hours.

Of these events, also, I submit that your Honors will take judicial notice. So that it will hardly do to say that in 1857 electric lighting was wholly unknown. It is historically untrue to say that, and it was undoubtedly by an oversight that the Supreme Court of Missouri, in their opinion in this case, committed themselves to any such statement of fact.

But suppose it were true. Can anything be broader than the words "which may now or hereafter be used as a substitute therefor"? If those words do not embrace any possible improvement in any possible direction in the art of artificial lighting, I should like to know what they mean; and, if so, they embraced electric lighting whenever it should become known. We say it was known at the time. But whether it was or not, when it came to be known it was within the language of the charter.

There are several other points made by my friend, Mr. Marshall, which, I think, if discussed a little more fully, would tend to show what the trouble in this case is. A

good deal was said which certainly was wholly foreign to the merits of this controversy.

I do not quite understand the bearing of his remark, that if this company had the right to assign its franchises, the wealth of India would not purchase the franchise. Are we to understand that as a suggestion to this Court that the decision of this case may or should by any possibility depend, in any sense, directly or indirectly, upon the supposed pecuniary value of the franchises granted to the Laclede Gas Light Company by the State of Missouri in 1857? I am very sure my friend would hasten to disclaim any purpose of that kind. I do not understand that the question whether it is a valuable franchise or a valueless franchise has any bearing upon the legal rights of the company. I confess that I heard with regret expressions that might be unfortunately construed in that way.

As to what was said about monopoly and the terrible consequences to be apprehended from the privilege in the relator's charter of leasing, selling, or disposing of its franchises or any part thereof, it seems sufficient to refer to what my brief contains on those subjects. This charter confers no exclusive right, and it is not, therefore, a monopoly. The New Orleans Gas Company's rights were exclusive, but this court upheld them as having been granted by a valid statute, which no court has the right or power, even had it the inclination, to set aside; the expediency of such legislation being, as this court said in the *Louisville Gas Case*, in 115 United States, 698, "a matter for legislative determination, behind which the courts should not attempt to go." As to the relator's right to assign its franchises, the same remarks apply; and in any event, what difference can it make to the city or the public whether they are held by the relator or by any other person or persons standing in its shoes? What have suggestions like these to do with the merits of this case?

One statement made by Mr. Marshall I heard with great

surprise, namely, that the city of St. Louis had no intention of enforcing the payment of the 5 per cent. tax on gross receipts, the payment of which or an agreement to pay which, and to comply with every other ordinance that may be enacted hereafter, backed by a penal bond in twenty thousand dollars, is one of the express conditions prescribed by this ordinance. I do not know by what authority that statement was made or any such assurance given. Today for the first time have I heard any such intimation, and I am afraid that in respect of such a matter, a matter of municipal policy and purpose, not of professional advice or opinion, the authority of the city counsellor would not be sufficient.

The real controversy in this cause, as I have repeatedly said, is simply whether the relator shall be permitted to enjoy or shall be compelled to surrender its franchises derived from the State, at the mere demand and dictation of the city authorities of St. Louis. That is what it all means.

The city of St. Louis became a party to this suit voluntarily. It adopted the pleadings of its Street Commissioner, both as to facts and law. It is responsible for everything that has been done and said in the case since that time. It is not a question of a subordinate officer in any degree. We were very glad to have the city become a party. Your Honors will remember that in the opinion of the Supreme Court of Missouri, at an interlocutory stage of the cause, they declined to pass upon certain questions because the city was not a party; but the city became a party, and now the city is the avowed defendant, as it was the real defendant from the beginning.

What does the city demand? Aside from merely technical objections to the validity of the relator's charter and the rights its confers, the city bases its persistent refusal to permit the relator to exercise those rights upon the proposition that we have not complied with that ordinance. We set out that ordinance in full in our reply, so that there should be no mistake as to its scope and meaning, and I have en-

deavored to make plain to your Honors what it does really mean.

The very first requirement, the condition precedent to all else, is—and in this Mr. Marshall agrees with me—is that the relator shall obtain an ordinance from the Municipal Assembly authorizing it to carry on the electric lighting business in the city of St. Louis. Section 603 of the Revised Ordinance, 1892, begins with the explicit provision that no person or corporation shall place any wires conveying electricity along, across, or under any street in St. Louis unless he or it shall be duly authorized by the Municipal Assembly, and then only as hereinafter provided. That provision alone involves the whole controversy. Grant that, and the city authorities have *carte blanche* on which to write anything they choose. The rest is mere matter of detail, subject to alteration from time to time at the will of the city; but the permanence of the city's absolute control is secured by also requiring a formal acceptance of this ordinance, with an agreement to comply with any and all future ordinances of the Assembly and regulations of the Board of Public Improvements, secured by a bond in twenty thousand dollars, which also secures the payment of the 5 per cent. tax on gross receipts. And your Honors will observe that the provision in section 612, that no person, corporation, or association shall be entitled to *any of the privileges conferred by this article* (which covers the whole subject of the erection and maintenance of electric wires along, across, or under any and all the city streets for producing light, heat, or power), except upon the following conditions—that is, the conditions I have mentioned.

The question was asked whether the relator applied to the Board of Public Improvements for a permit. It did not. Why? Because such an application would have been an idle form.

Lex neminem ad vana cogit. The Board of Public Im-

provements is authorized by section 605 to receive applications for permits to occupy streets with electric wires, overhead or underground, accompanied by a plat and details of the route, &c.; but they can receive such applications only from persons or corporations duly authorized by the Municipal Assembly to do business in St. Louis, and of course they cannot examine or approve applications or grant permits to any others. All these questions were fully considered by counsel for relator, and it was manifest that there was no reason for making a request of the Board of Public Improvements which we knew they were bound to and would refuse, because the relator was not entitled to make it, under the terms of the ordinance itself, unless it was willing to and did surrender to the city its charter rights.

If all the city of St. Louis wants or has wanted has been that this company should submit its plans to the Board of Public Improvements, why have they not said so in the past three years? Why has the city stood firmly upon the proposition—"Until you comply with that ordinance you cannot lay your pipes." That is their position. There is no disclaimer or suggestion that it is not.

Mr. MARSHALL: May I answer that question?

Mr. HITCHCOCK: Certainly.

Mr. MARSHALL: We have not entered such a disclaimer because you never asked such a thing from the city.

Mr. HITCHCOCK: No; we have not, and the reason is obvious. The Laclede Gas Light Company, if it went to the city and offered to comply with that ordinance, would by so doing have said to the city, "Our charter rights are subject to your approval." Your Honors will readily understand that they could not take that position. A Board of Directors of a corporation who should ask permission from a third person to do that which their charter authorized them to do, under circumstances such as these, amounting to a surrender of the company's essential rights, would be faithless to their trust. It would have been a very simple

thing for the Municipal Assembly of St. Louis, if their sole purpose was to protect the public, to pass an ordinance providing that if any corporation claiming such franchises should file plans which are approved and which shall be consistent with the safety of the public they should be authorized to obtain the necessary permit.

I repeat it, this relator recognizes to the fullest extent its own obligations under its charter, as well as the rightful authority of the city in its proper sphere. But the position which the city authorities have constantly maintained as against the relator left it no alternative except to surrender its vested rights or contend for them in the courts.

The request of the relator to the Street Commissioner for a permit to excavate—not, of course, for a permit to lay conduits for its electric wires, for that its charter authorizes—was simply a recognition of the immediate duty and authority of that officer to keep the streets in good order, and to prevent unauthorized persons from excavating or otherwise injuring their surface. If relator's charter authorizes it to lay conduits such as it intended, then it was entitled to a permit to make the necessary excavations. The Street Commissioner was the proper and only city officer to give such permit; and, assuming relator's rights as I have stated them, it was his legal duty to comply with that request, and for his refusal to do so mandamus is the proper remedy.

Upon these grounds, together with the suggestions contained and authorities cited in the brief for the plaintiff in error, and sincerely acknowledging the patient and considerate attention received from your Honors, I respectfully submit the cause.